

**Fundamental Problems concerning the Treaty
on Mutual Relations between the Federal
Republic of Germany and the Czechoslovak
Socialist Republic of December 11, 1973
with special reference to the Munich Agreement**

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I hereby submit two copies of my thesis
for the Degree of Master of Laws.

I declare that the whole thesis has been
composed by myself and is the result of
my own work.

(Heinrich Weiler)

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⁺ The different ways of writing documents' dates (see pp. 365-422 of the Appendix) is due to the fact that some documents (No. 1, section 2, 2, 3, 6, 9-12 and 14) are original texts or translations by others, and some (No. 1 section 1, 4-5, 7-8, 13 and 15-21) are own translations.

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ABSTRACT OF THESIS

The thesis deals with the Treaty of December 11, 1973 on Mutual Relations between the Federal Republic of Germany and the Czechoslovak Socialist Republic, its historical background, substance and importance.

The thesis begins with the historical background.

Part I shows that in the tenth Century a Czech Kingdom developed in Bohemia and Moravia which formed part of the "Holy Roman Empire of the German Nation" and that Bohemian Kings were repeatedly elected emperors of this Reich. Germans lived in large numbers in this Kingdom. The Kingdom eventually passed to the House of Habsburg and remained part of the hereditary lands until the dissolution of Austria-Hungary at the end of World War I. Slovakia and Ruthenia were from the beginning part of the Kingdom of Hungary and remained so until the collapse of the Habsburg Monarchy.

In 1918 Bohemia, Moravia, Slovakia and Ruthenia were combined in the new State of Czechoslovakia, which included more than three million Germans. In 1938 Hitler demanded the union with Germany of the territories with predominantly German inhabitants and threatened to march into Czechoslovakia. For the sake of peace France and the United Kingdom urged the Czechoslovak Government to yield to Hitler's demand. The Prague Government consented to do so.

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At the Conference of Munich on September 29, 1938 France, Germany, the United Kingdom and Italy arranged some of the terms and conditions governing the cession of the Sudeten German territory. The remaining questions were settled by the German-Czechoslovak Agreement of November 20, 1938 under the auspices of the International Commission composed of representatives of France, Germany, the United Kingdom, Italy and Czechoslovakia. In this manner, the surrender of the territory of Germany was realized.

On March 15, 1938 Hitler annexed the rest of Bohemia and Moravia to the German Reich as a Protectorate. The non-Hungarian areas of Slovakia became a separate State. The State of Czechoslovakia had ceased to exist, but it was subsequently restored. With the exception of a small number who were allowed to remain, the German inhabitants were deported from the territory of Czechoslovakia and completely expropriated.

The Federal Republic agreed as early as 1966 to normalize relations with Czechoslovakia, but difficulties developed which were not resolved until December 11, 1973 when the Treaty on Mutual Relations was signed.

Part II examines these difficulties.

The most important difficulty was caused by the adherence of the Czechoslovak Government to the view that the Munich Agreement was void from the very beginning, whereas the Federal Government took the view that the

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Munich Agreement was legal, but that the subsequent annexation of the rest of Bohemia and Moravia by Hitler on March 15, 1938 violated the Agreement. France and Italy as signatories of the Agreement share Czechoslovakia's view; the United Kingdom shares that of Germany.

The Czechoslovak Government agreed to the cession to Germany of the territory with a predominantly German population, to the Munich Agreement of September 29, 1938, and to the German-Czechoslovak Agreement of November 20, 1938 and have executed and fulfilled these agreements. Thereby the argument that the Czech Parliament in accordance with the Czechoslovak Constitution did not give its assent to the declarations of the Czechoslovak Government loses force. The fact that Hitler obtained the assent of Czechoslovakia by threatening to march in with his forces was according to existing international law not a ground for the invalidity of the treaty.

Moreover, the Munich Agreement was not part of the conspiracy against the peace planned by Hitler. In 1938 Hitler intended to crush Czechoslovakia. However, because of the intervention by the powers of the Conference, especially the United Kingdom, he was forced for the time being to renounce this plan and to content himself with the cession of the predominantly German territory. In an Annex to the Munich Agreement, Hitler as well as France and the United Kingdom promised to

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guarantee the existence of the rest of Czechoslovakia. However no obligation to fulfill such a guarantee was accepted. The fact that this guarantee was not fulfilled is, therefore, not a violation of the Treaty.

The Munich Agreement became void when Hitler annexed the rest of Bohemia and Moravia in 1939 and as a consequence France and the United Kingdom withdrew from their treaty commitments.

The thesis then deals in Part III with the basic conception of the German-Czechoslovak Treaty of 1973 and the settlement of problems resulting from it.

An agreement on whether the Munich Agreement was void from the beginning or became void at a later date could not be reached. Therefore, it was merely stated that the Munich Agreement was invalid, and it was determined that the legal effects arising from the application of German Law in the period between September 30, 1938 and May 9, 1945 would not be affected, and that the Treaty would not constitute any legal basis for material claims by the Czechoslovak Socialist Republic and its natural and legal persons.

After the annexation of Bohemia and Moravia, German law conferred German nationality in any case on all ethnic Germans who possessed Czechoslovak nationality. After the restoration of Czechoslovakia the Czech leaders refused as a general principle to re-confer Czechoslovak nationality on ethnic Germans, and expelled them.

They even refused to grant Czechoslovak citizenship to those ethnic Germans who had not accepted German citizenship, and these people were expelled as well. In 1953 Czechoslovak citizenship was forced on those ethnic Germans who had not been expelled and who were considered German nationals according to German law. The German-Czechoslovak Treaty contains the mutual settlement of questions concerning nationality.

In consequence of the Czechoslovak opinion that the Munich Agreement was void ab initio, the Government maintains that all acts of German administrative bodies in Bohemia and Moravia had been illicit and had resulted in claims for damages. These claims do not find any legal basis in the Treaty and its declarations. German claims for damages are not affected by the Treaty.

The Germans remaining in Czechoslovakia on whom Czechoslovak citizenship was conferred for the most part are willing to immigrate to Germany. The Exchange of Letters on Humanitarian Questions, annexed to the Treaty, obligates Czechoslovakia to consider benevolently the requests for emigration, but does not give the applicants the right to emigrate. The German side declared reversely that, in accordance with the laws and regulations applicable in the Federal Republic, persons of Czech or Slovak nationality who so desire may emigrate to Czechoslovakia.

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The Letters contain further the mutual promise to give attention to the humanitarian questions, to develop travel between the two countries and to examine possibilities of technical improvements of travel. The contents of this exchange of letters will in principle be applied analogously to Berlin (West).

A Unilateral Letter of the Czechoslovak Government annexed to the Treaty informs the German Government of the statute of limitation for all punishable acts with the exception of those considered war crimes or crimes against humanity and which carry the death penalty.

Finally, another Exchange of Letters determined that Article II of the Treaty is valid also in Berlin (West) and that consequently the consular representation of natural persons living in West Berlin is effected by the Federal Government and its diplomatic missions. The Parties further proposed to agree in each individual case on the extension to Berlin (West) of treaties arising out of the implementations of Article V of the Treaty.

The importance of the Treaty cannot be underestimated, for it solves the age-old problem of the German-Czechoslovak mixed population in Bohemia and Moravia by the renunciation of territorial claims against the CSSR by the Federal Republic of Germany. However, this solution is defective since it does not adequately deal with the regulation of the emigration of the Germans remaining in

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the CSSR. The question as to when the Munich Agreement became void is dealt with satisfactorily. The rest of the Treaty takes into account the policy of détente which has begun between East and West, the success of which will determine the significance of the Treaty.

The decision of the German Federal Constitutional Court of January 25, 1977 concerning the law of July 12, 1974 securing assent to the Treaty of December 11, 1973 (decree and governing principle) is communicated in an addendum.

Part I

The Historical Context

1) Chronology up to the Establishment of the First Czechoslovak Republic

At the time of the Munich Agreement of 1938 Czechoslovakia comprised the territories of Bohemia, Moravia, Slovakia and Carpatho Ukraine. Apart from the last mentioned area all the other territories are now again part of Czechoslovakia.

At the beginning of the Christian era Bohemia was under the dominion of the Markomans, a Germanic tribe which later migrated to Bavaria. They were soon followed by the Czechs, and by the 9th Century Bohemia and Moravia were united as parts of the Great-Moravian Reich, subsequently destroyed by the Hungarians in 907-908. In Bohemia, under King Przemysl and his successors, a Czechoslovak Kingdom developed, which not only became part of the "Holy Roman Empire" but whose rulers were highest in rank among the princes of the Reich and the only entitled to call themselves kings. During the years 1018-21 Moravia was added to the Kingdom of Bohemia and from that time the two countries have been united.

King Ottokar II of Bohemia was also in possession of Austria, Styria, Carinthia and Krainia (Krain) but was deprived of these territories by Rudolf von Habsburg, the

founder of the Habsburg dynasty. In 1306 King Przemyśl's family died out and the Kingdom of Bohemia passed to the House of Luxembourg. The new rulers added the territories of Eger, Upper Lausitz and Silesia to the Kingdom. In point of fact, the second of the Luxembourg princes who acceded to the Royal Throne at Prague was elected Emperor of the "Holy Roman Empire" (Charles IV, 1346-78). Charles governed the Reich from Bohemia, which in the meantime had become its administrative centre. His reign was known as the Golden Age of Bohemia. In 1348 he founded the first German university at Prague.¹

The last representative of the House of Luxembourg on the Bohemian throne, the Emperor Sigismund, ordered the persecution of the Hussite movement which was not only a religious but also a Czech national movement. Although Sigismund bequeathed the Bohemian crown to the House of Habsburg, the Hussite George Podiebrad (1458-71) refused to acknowledge this and declared himself King of Bohemia. He was succeeded by Wladislav from the Polish House of Jagiellones.² It was not until the reign of Ferdinand I that Bohemia came almost permanently under the rule of the House of Habsburg - the only interruption occurring

1. Prinz zu Löwenstein, Deutsche Geschichte, p. 190; Rimili, Weltgeschichte, Bd. II pp. 251-4.

2. Schieder, Handbuch der Europäischen Geschichte, Bd. 3 pp. 219-22.

during the Thirty Years War, when Frederick V, Elector of Palatinate, became King of Bohemia. The Habsburgs continued to rule over Bohemia and Moravia until the end of the First World War.

Slovakia had also been part of the Great Moravian Reich during the 9th Century but was taken over subsequently by the Hungarians after the Reich was destroyed; thenceforth, until the end of the First World War, it remained part of Hungary which itself was part of the Austro-Hungarian monarchy. Thus, apart from the episode of the Great Moravian Reich, Slovakia has never in her history been united with Bohemia and Moravia.

As the political leaders of the various nations represented in the Danubian monarchy made preparations for the independence of their peoples, with the collapse of the monarchy imminent, the leader of the Czechs, Thomas G. Masaryk, and Slovak immigrants signed a treaty on May 30, 1918 in Pittsburgh (USA) to provide the basis for the unification of the Czechs and the Slovaks within one State.³

2) The State and the German Minority

At the time of the collapse of the Austro-Hungarian Monarchy at the end of the First World War, a government

3. Hoensch, Geschichte der Tschechoslowakischen Republik 1918-1965, p. 30.

of German Bohemia was established in the German parts of Bohemia which aimed at unification with Austria. This German Bohemian government, however, was expelled by the Czechs. The Czechs, supported by the Peace Conference at Paris, founded the multi-peoples' State of Czechoslovakia, in the boundaries of which Czechs, Slovaks, Germans, Hungarians, Poles and Ruthenians were united.⁴

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4. Prinz zu Löwenstein (f.n.1), p. 455.
 The preamble of the Treaty of September 10, 1919 states: "Whereas the union which formerly existed between the old Kingdom of Bohemia, the Markgraviate of Moravia and the Duchy of Silesia on the one hand and the other territories of the former Austro-Hungarian Monarchy on the other has definitely ceased to exist; whereas the peoples of Bohemia, of Moravia and of part of Silesia, as well as the peoples of Slovakia, have decided of their own free will to unite, and have in fact united, in a permanent union for the purpose of forming a single sovereign independent State under the title of the Czechoslovak Republic; and whereas the Ruthene people to the south of the Carpathians have adhered to this union; whereas the Czechoslovak Republic in fact exercises sovereignty over the aforesaid territories and has already been recognized as a sovereign independent State by the (other) High Contracting Parties; the United States of America, the British Empire, France, Italy and Japan on the one hand, confirming their recognition of the Czechoslovak State as a sovereign and independent member of the family of Nations within the boundaries which have been or may be determined in accordance with the terms of the Treaty of Peace with Austria of even date; Czechoslovakia on the other hand, desiring to conform her institutions to the principles of liberty and justice, and to give a sure guarantee of all the inhabitants of the territories over which she has assumed sovereignty; the High Contracting Parties, ...have agreed as follows"....(Nouveau Recueil Général (f.n.6), loc.cit. p. 512. French text).

Yet, the government of this multi-peoples' State lacked the resolve to introduce the Rights of Minorities promulgated by the League of Nations.

Es war den Tschechen in den zwanzig Jahren ihrer staatlichen Selbständigkeit... nicht gelungen, ... (das) Kernproblem ihres Staates einer tragfähigen Lösung zuzuführen und die im Staate lebenden Völker und Volksgruppen im Wege eines innerpolitischen Ausgleichs in ein dauerhaftes Verhältnis zum Staate zu bringen.⁵

A source of constant irritation for sections of the German population is provided by the question of the protection of minorities.

On September 10, 1919 a Treaty between the Allied and Associated powers (United States, Great Britain, France, Italy and Japan) and Czechoslovakia was signed (Protection of Minorities)⁶ which in Article 2 granted to minorities in Czechoslovakia complete protection of

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5. Korkisch, Zur Frage der Weitergeltung des Münchener Abkommens, loc.cit. p. 89-90. E.t.: Within the twenty years of their national sovereignty, the Czechs proved unable to solve... (the) central problem of their State in a satisfactory manner, namely to establish a durable relationship between the various peoples and ethnic groups and the State by means of internal arrangement.
 6. Hudson, International Legislation, Vol. I No. 4, pp. 298-312; Nouveau Recueil Général de Traités, Troisième Série, Tome XIII, pp. 512-520. This treaty, envisaged in Article 57 of the Treaty of St. Germain of September 10, 1919, is modelled on the Treaty for the Protection of Minorities in Poland of June 28, 1919 (Hudson, loc.cit., No. 3, pp. 283-298).

life and liberty, and which attributed to German nationals habitually resident or possessing rights of citizenship Czechoslovak citizenship ipso facto.

Article 7 granted free use of any language in private intercourse, commerce, religion, in the press or publications of any kind and at public meetings. In addition facilities for the use of the minorities' language before the courts were provided. Article 8 prescribed that the minorities should enjoy the same treatment and security in law and in fact as the other Czechoslovak nationals and equal rights to establish, manage and control charitable, religious and social institutions, schools and other educational establishments were announced. Article 9 granted them adequate facilities for ensuring that the instruction would be given through the medium of their own language. These minority rights, however, were difficult to realize.

Numerous complaints had been submitted to the League of Nations long before Hitler's dictatorship.⁷ However,

7. Wright, The Munich Settlement and International Law, loc.cit. p. 17 writes: "Czechoslovakia was bound by the treaty of St. Germain (Art. 57), the Minorities Treaty of September 10, 1919, and the Council resolution of November 29, 1920, to respect rights of minorities and to accept the supervision of the League of Nations in regard thereto."

The Guarantee of the League of Nations with regard to the stipulations contained in Chapters I and II of the Treaty between the United States, the British Empire, France, Italy and Japan on the one side, and Czechoslovakia on the other, signed at Saint Germain-en-Laye, September 10, 1919 reads as follows:

"The Council of the League of Nations resolves that:

1. The stipulations of Chapters I and II of the Treaty between the United States of America, the British Empire, France, Italy and Japan on the one side, and Czecho-Slovakia on the other, signed at Saint-Germain-en-Laye, 10 September, 1919, so far as they affect persons belonging to racial, religious or linguistic Minorities be hereby placed under the guarantee of the League of Nations.

2. The Secretary-General of the League of Nations shall collect and submit, in due time, to the Council of the League of Nations, information respecting the constitution of the Ruthene territory south of the Carpathians, within frontiers delimited by the Principal Allied and Associated Powers, as an autonomous unit within the Czecho-Slovak State" (League of Nations, Official Journal 1920, pp. 80-1).

these complaints never brought any relief, for the procedure, as it was provided for and practised at Geneva, made it extremely unlikely that such complaints would ever be acted upon. After a formal proceeding of admissibility was held before the Secretary General of the League of Nations, a preliminary discussion of the evidence at hand was conducted in the Three Powers' Committee of which the President and two additional Council representatives were members. However, an actual trial before the League Council was possible only if one of the powers represented in the Council determined that the case should be heard and presented it as a matter of interest to itself. Such a development rarely occurred.⁸

In any case Prague overlooked from the very beginning an essential fact which George F. Kennan characterized as follows:

Czechoslovakia is, after all, a Central European State. Its fortunes must in the long run lie with - and not against - the dominant forces in this area.⁹

8. Strupp-Schlochauer, Wörterbuch des Völkerrechts, Minderheitenrecht (Law of Minorities), Bd. 2, p. 533.

9. Kennan, From Prague after Munich, Diplomatic papers 1938-1940, p. 5.

Because of these circumstances and due to the treatment of the Germans in Czechoslovakia strong feelings of dissatisfaction existed in Germany long before Hitler came into power, allowing him to justify easily his expansionist aims and to pursue the "solution of the question of the Sudeten Germans". Thus, his policy found unexcepted support in the uncompromising attitude of the government in Prague.¹⁰

Soon after Hitler had come into power, Konrad Henlein's Sudetendeutsche Heimatfront (Sudeten German Home Front), founded in October 1933, and which after 1935 continued to exist as the Sudeten German Party, began to assert the complaints of the German minority with a hitherto unknown vehemence.¹¹ But the Prague Government proved an uncompromising attitude towards the Sudeten German demands which aimed at no more than autonomy within the Czechoslovak State.¹²

The Government in Prague seemed to become more conciliatory only when Hitler's position became steadily stronger. Thus Dr. Benes, the President of Czechoslovakia, on the occasion of a visit to the Sudetenland in 1936 admitted that the government had made mistakes in

10. See Hoensch (f.n.3), p. 65-70.

11. Ibid., p. 69.

12. Ibid.

its treatment of the Sudeten Germans.¹³ He also promised several times to carry out reforms concerning the minorities' law. However, no really substantial reforms were ever carried out in a way which could have deprived Hitler of any justification for going ahead in this question.

The German "Anschluss" with Austria in the Spring of 1938 weakened the strategic position of Czechoslovakia decisively, and as the Czechoslovak Government had not kept their promise of 1937 to carry out certain reforms, Henlein's demand for autonomy for the Sudetenland, which he presented in a speech at Karlsbad in April 1938, not only received the support of all Sudeten Germans, but found understanding in foreign circles as well.¹⁴

13. Wright (f.n.7), p. 21.

14. See Runciman Report, Appendix D; Wheeler-Bennett, Munich, Prologue to tragedy, pp. 450, 453; Kral, Das Abkommen von München 1938, p. 10-2; Bolton, Czech Tragedy, pp. 141-2.

On April 24, 1938, at the Party meeting of the Sudeten Germans at Karlsbad, Konrad Henlein in speaking for the German national group, stated their political attitude to the Czechoslovak Government's proposals for a settlement of the minority question (the minority Statute, etc.), and propounded his eight points as the basis of this and "the way for a peaceful development" as follows:

1. Restoration of complete equality of German national group with the Czech people;
2. Recognition of the Sudeten German national group as a legal entity for the safeguarding of this position of equality within the State;
3. Confirmation and recognition of the Sudeten German settlement area;
4. Building up of Sudeten German self-government in the Sudeten German settlement area in all branches of public life insofar as questions affecting the interests and affairs of the German national group are involved;
5. Introduction of legal provisions for the protection of those Sudeten German citizens living outside the defined settlement area of their national group;
6. Removal of wrong done to Sudeten German element since the year 1918, and compensation for damage suffered through this wrong;
7. Recognition and enforcement of the principle: German public servants in the German area;
8. Complete freedom to profess adherence to the German element and German ideology.

(Memorandum of the Eight Demands made by Konrad Henlein at the Sudeten German Party Congress at Karlsbad, The Eight Demands of Konrad Henlein announced at Karlsbad, April 24, 1938, Documents (Germany), Ser. D, Vol. II p. 242).

On April 28/29, 1938 France entered into negotiations with the British Government in order to establish a common policy with regard to the question of Czechoslovakia, for under the terms of the Treaty of Mutual Assistance with Czechoslovakia France was obliged to come to her support in case of an unprovoked attack. The result of the Anglo-French talks was a decision to work for a peaceful solution of the Sudeten question.

But even at this time Prague adhered to her uncompromising attitude¹⁵ and on May 20 proclaimed the partial mobilization of her armed forces. Hitler's reaction was the order of May 30, 1938 to prepare for the elimination of the Czechoslovak State by means of a military operation.¹⁶

In the same month Henlein's party achieved remarkable success: the result of the communal elections of May 21 demonstrated that 90% of the Sudeten Germans supported his party.¹⁷ Nevertheless, the Sudeten German Party continued to seek a compromise by aiming at autonomy within Czechoslovakia. However, Henlein's Plan was not recognized and accepted by the Czechoslovak Government.

15. This may be illustrated by a quotation from the Runciman Report, loc.cit., p. 451): "I believe these complaints to be in the main justified. Even as late as the time of my mission (August 1938), I could find no readiness on the part of the Czechoslovak Government to remedy them on anything like an adequate scale."

16. Kral (f.n.14), p. 13-4; Hoensch (f.n.3), pp. 89-90.

17. Hoensch, Ibid., p. 90.

An eine Erfüllung der Karlsbader Forderungen dachte am 30. Mai niemand in Prag.¹⁸

The negotiations between the Prague Government and the Sudeten German Party dragged on without reaching any positive conclusion.

The French Government, by virtue of their treaty obligation resulting from the Treaty of Mutual Assistance with Czechoslovakia had approached the British Government during a Ministers' Conference from April 28 to 29 in London with a request to maintain a common attitude in the German-Czechoslovak conflict.¹⁹ As a result of these talks the Government in Prague was requested to make extensive concessions to Sudeten Germans.²⁰ As these requests went unheeded, the British Government on July 25 inquired in Prague whether agreement could be reached on a proposal to appoint an "advisor" whose task would be to mediate in the conflict between the Government and the Sudeten Germans.²¹

After Prague had given her assent to this suggestion, the mediator, Lord Runciman, arrived in Prague on August 3, 1938 and began his work. On September 21 he handed over his report, known as the "Runciman Report", in which

18. Hoensch, Ibid., p. 90. E.t.: A realization of the Karlsbad demands was not taken into consideration by anyone in Prague on May 30, 1938.

19. Hoensch, Ibid., p. 88; Kral, Ibid., p. 12.

20. Kral, Ibid., p. 15.

21. Wright (f.n.7), p. 22; Kral, Ibid., p. 17.

he recommended that territories with a clear majority of German population should be immediately transferred to Germany. He concluded:

Any kind of plebiscite or referendum would, I believe, be a sheer formality in respect of these predominantly German areas. A very large majority of their inhabitants desire amalgamation with Germany. The inevitable delay involved in taking a plebiscite vote would only serve to excite popular feelings, with perhaps most dangerous results. I consider, therefore, that these frontier districts should at once be transferred from Czechoslovakia to Germany... .22

3) The September Crisis of 1938

During Lord Runciman's stay in Czechoslovakia a fundamental change concerning the political aims of the Sudeten Germans had taken place: they were no longer content with an autonomous status within the State of Czechoslovakia but demanded the cession of the territories in question to the German Reich.

At the beginning of Runciman's mission negotiations were conducted on the basis of the programme of Karlsbad, known as the Eight Point Programme, proposed by the Sudeten Germans, to which the Czechs answered with their so called Fourth Plan.²³

However, when bloody riots occurred in the Sudeten German area on September 12 and 13, the Sudeten German Party broke off negotiations on September 13. Thus the

22. British White Paper, H.M.S.O. Cmd. 5847, No. 1, Wheeler-Bennett (f.n.14), p. 453.

23. Hoensch (f.n.3), p. 95.

original purpose of Lord Runciman's mission, to achieve a reconciliation between the Prague Government and the Sudeten Germans, had failed. It now appeared to him as well that the only possible solution to the problem was to transfer those territories to Germany that were almost completely populated by Germans. This sudden change of opinion was facilitated by the fact that at the time when a solution of the Sudeten German question was envisaged in terms of an autonomous status within the Czechoslovak State, Runciman had declared that this could only be considered "temporary, not lasting."²⁴

The riots of September 11/12 brought the tension to its climax. On September 12 Hitler made a speech at Nuremberg in which he demanded the right of self-determination for all Sudeten Germans.

On September 15 the Sudeten German leaders, with Henlein as their spokesman, demanded for the first time that the German territories should be transferred to Germany.²⁵ Knowing that this act would be considered high treason by the Government in Prague they left Czechoslovakia and called for the formation of the so-called "Freikorps" (volunteer corps) whose function would be to guarantee the protection of the German population in Czechoslovakia.²⁶

24. Wheeler-Bennett (f.n.14), p. 452.

25. They proclaimed on this day the so-called "Heim-ins-Reich"-Aufruf (Home to the Reich challenge). See Hoensch (f.n.3), p. 95.

26. Hoensch, Ibid.

This "Freikorps" obviously never attained any significant importance. Thus Lord Runciman declared:

Unless, therefore, Herr Henlein's Freikorps are deliberately encouraged to cross the frontier, I have no reason to expect any notable renewal of incidents and disturbances. In these circumstances the necessity for the presence of State Police in these districts should no longer exist. As the State Police are extremely unpopular among the German inhabitants, and have constituted one of their chief grievances for the last three years, I consider that they should be withdrawn as soon as possible. I believe that their withdrawal would reduce the causes of wrangles and riots.²⁷

Undoubtedly Lord Runciman would never have made such suggestions if he had envisaged any possible danger of an attack of the "Freikorps" against Czechoslovak territory. At any rate the events of the next days robbed the Freikorps-plans of their importance.

The failure of Lord Runciman's attempt at mediation, the riots in the Sudetenland mentioned above and the uncompromising attitude of the Prague Government caused the British Government to launch immediate action to prevent a violent solution of the problem.

On September 15 the British Prime Minister, Sir Neville Chamberlain, flew to Berchtesgaden in order to have a private talk on the matter with Hitler himself.²⁸

27. Runciman Report, in Wheeler-Bennett (f.n.14), p. 452.

28. Hoensch (f.n.3), p. 96.

British and French reviewed the Hitler-Chamberlain meeting on September 18.²⁹ The results of this conference are expressed in the official notes of the two Governments addressed to the Czechoslovak Government. The notes were handed over in Prague on September 19, 1938. The notes provided, in part:

We are both convinced that, after recent events, the point has now been reached where the further maintenance within the boundaries of the Czechoslovak State of the districts mainly inhabited by the Sudeten-Deutsch cannot in fact continue any longer without imperilling the interests of Czechoslovakia herself and of European peace. In the light of these considerations both Governments have been compelled to the conclusion that the maintenance of peace and the safety of Czechoslovakia's vital interests cannot effectively be assured unless these areas are now transferred to the Reich.³⁰

29. Celovsky, Das Münchener Abkommen 1938, p. 356; Hoensch (f.n.3), p. 96.

30. Akten zur Deutschen Auswärtigen Politik 1918-1945, Nr. 523, p. 664-5; Documents on British Foreign Policy, Third Series, Vol. II, pp. 404-6 (No. 937):

Viscount Halifax to Mr. Newton.

The further text of the Statement by the Governments of Great Britain and France to the Czechoslovak Government, September 19, 1938 runs thus:

"Representatives of French and British Governments, after consultation in London, are agreed to address the following message to President Benes:...

1. The representatives of the French and British Governments have been in consultation today on the general situation, and have considered the British Prime Minister's report of his conversation with Herr Hitler, British Ministers also placed before their French colleagues their conclusions derived from the account furnished to them of the work of his Mission by Lord Runciman. ...

2. This (transfer of areas inhabited mainly Sudeten Germans to the Reich) could be done either by direct transfer or as the result of a plebiscite. We realise the difficulties involved in a plebiscite, and we are aware of your objections already expressed to this course, particularly the possibility of far-reaching repercussions if the matter were treated on the basis of so wide a principle. For this reason we anticipate in the absence of indication to the contrary that you may prefer to deal with the Sudeten-Deutsch problem by the method of direct transfer, and as a case by itself.

3. The areas for transfer would probably have to include areas with over 50 per cent of German inhabitants, but we should hope to arrange by negotiations provisions for adjustment of frontiers, where circumstances render it necessary, by some international body including a Czech representative. We are satisfied that the transfer of smaller areas based on a higher percentage would not meet the case.

4. The international body referred to might also be charged with questions of possible exchange of population on the basis of right to opt within some specified time limit.

5. We recognise that if the Czechoslovak Government is prepared to concur in the measures proposed, involving material changes in the conditions of the State, they are entitled to ask for some assurance of their future security.

6. Accordingly His Majesty's Government in the United Kingdom would be prepared, as a contribution to the pacification of Europe, to join in an international guarantee of the new boundaries of the Czechoslovak State against unprovoked aggression. One of the principal conditions of such a guarantee would be the safeguarding of the independence of Czechoslovakia by the substitution of a general guarantee against unprovoked aggression in place of existing treaties which involve reciprocal obligations of a military character.

7. Both the French and British Governments recognise how great is the sacrifice thus required of the Czechoslovak Government in the cause of peace. But because that cause is common both to Europe in general and in particular to Czechoslovakia herself, they have felt their duty jointly to set forth frankly the conditions essential to secure it.

8. The Prime Minister must resume conversation with Herr Hitler not later than Wednesday, and earlier if possible. We therefore feel we must ask for your reply at earliest possible moment."
(Klochko and others, New Documents on the History of Munich, pp. 83-85).

The Czechoslovak Government had already decided to proclaim general mobilization of her armed forces and to justify this step by claiming to have information about considerable military activities on the German side.³¹ Therefore the first reply of the Prague Government to the French and British notes was couched in a tone very much appropriate to their uncompromising attitude. The suggestions of the two Governments were plainly rejected on the evening of September 20.³²

31. Akten, Nr. 524, p. 665.

32. Note from the Czechoslovak Government to the Governments of Great Britain and France, September 20, 1938 (excerpts):

"Le Gouvernement tchécoslovaque remercie les Gouvernements britannique et français de la communication qu'ils lui ont faite, en formulant leur façon de voir sur la solution des difficultés internationales actuelles concernant la Tchécoslovaquie. Conscient de sa responsabilité qui découle pour lui des intérêts de la Tchécoslovaquie, des intérêts des amis et alliés de cette dernière, ainsi que des intérêts de la paix générale, il exprime sa conviction que les projets qui y sont contenus ne sont pas à même de réaliser le but que poursuivent les Gouvernements britannique et français dans les grands efforts qu'ils déploient en faveur de la paix.

Ces projets ont été conçus sans consultation préalable avec les représentants de la Tchécoslovaquie. ...

En effets le Gouvernement tchécoslovaque n'a même pas la possibilité au point de vue de la Constitution de pouvoir prendre une décision concernant les frontières. ... Dans tous les cas, le parlement devrait être entendu.

De l'avis du Gouvernement, l'acceptation d'un projet de cette nature équivaudrait à laisser mutiler entièrement l'État à tous égards. ...

Le Gouvernement tchécoslovaque est sincèrement reconnaissant de l'intention des Grandes Puissances de garantir l'intégrité de la Tchécoslovaquie, il l'estime et l'apprécie hautement. Une telle garantie ouvrirait certainement la voie à une entente entre tous les intéressés, si les conflits nationalitaires actuels se réglaient à l'amiable sans imposer à la Tchécoslovaquie des sacrifices inacceptables. ...

La Tchécoslovaquie est toujours restée fidèle aux traités et a rempli les engagements qui en découlaient pour elle à l'égard soit de ses amis, soit de la Société des Nations et de ses membres, soit des autres peuples. Elle a été et est toujours prête à y faire honneur dans toutes les circonstances. Si elle se défend aujourd'hui contre la possibilité de violences, (sic) elle le fait en s'appuyant sur les engagements encore récents et les déclarations de son voisin, ainsi que sur le Traité d'arbitrage du 16 octobre 1926, que plusieurs déclarations du Gouvernement allemand actuel ont reconnu être encore en vigueur. Le Gouvernement tchécoslovaque souligne la possibilité d'appliquer ce traité et en demande l'application. Faisant honneur à sa signature, il est prêt à accepter la sentence d'arbitrage qui serait prononcée. Toute espèce de conflit pourrait être ainsi conjurée. Cela rendrait possible une solution rapide, conforme à l'honneur et à la dignité de tous les États intéressés. ...

La Tchécoslovaquie a toujours été liée avec la France par l'estime et l'amitié la plus dévouée ainsi que par une alliance à laquelle aucun gouvernement et aucun Tchécoslovaque ne failliront jamais. Elle a vécu et continue à vivre dans sa foi en la grande nation française, dont le gouvernement lui a si souvent assuré la solidité de son amitié. Elle est liée à la Grande-Bretagne par un dévouement et une amitié traditionnels, par le respect et l'estime, dont s'inspirera toujours la Tchécoslovaquie dans la collaboration...

Le Gouvernement tchécoslovaque sait que les efforts déployés par les Gouvernements britannique et français découlent d'un véritable intérêt. Il les en remercie bien sincèrement. Mais, pour les motifs déjà énumérés, il leur adresse de nouveau un appel suprême et les prie de reconsidérer leur point de vue..... (Documents on British Foreign Policy, 1919-1939, Third Series, Vol. II, No. 987, pp. 434-6).

E.t.: The Czechoslovak Government thanks the British and French Governments for the communication which they have made to it in which they set out their point of view on the solution of existing international difficulties regarding Czechoslovakia. Conscious of its responsibility for the interests of Czechoslovakia, the interests of her friends and allies as well as for the interests of general peace, the Czechoslovak Government expresses its conviction that the proposals which are contained in that communication cannot attain the object at which the British and French Governments are aiming in the great efforts which they are making in favour of peace.

These proposals were drawn up without previous consultation with representatives of Czechoslovakia.

...

Actually the Czechoslovak Government is not in a position from the point of view of the Constitution to take a positive decision regarding the frontiers of Czechoslovakia. ... In any case it would be necessary to consult Parliament.

In the opinion of the Government acceptance of a proposal of this kind would be equivalent to acquiescence in the complete mutilation of the State in every respect. ...

The Czechoslovak Government is sincerely grateful for the intention of the Great Powers to guarantee the integrity of Czechoslovakia, it highly values and appreciates this intention. Such a guarantee would certainly open the way to understanding between all those interested if existing nationality conflicts were amicably settled without imposing on Czechoslovakia unacceptable sacrifices. ...

Czechoslovakia has always remained faithful to treaties and has carried out engagements arising from them either with regard to her friends or to the League of Nations and its members or to other peoples. She has been and is always ready to honour treaties in all circumstances. If she defends herself today against the possibility of violence, she does so relying on engagements which are still recent and on declarations of her neighbour as well as on the Arbitration Treaty of October 16, 1926, which has been recognised to be still in force by several declarations of the present German Government. The

Czechoslovak Government underlines the possibility of applying this treaty and demands that it should be applied. Honouring their signature they are ready to accept whatever arbitral decision might be made. Any kind of conflict could be thus avoided. This would render possible a quick solution in conformity with the honour and dignity of all interested States. ...

The Czechoslovak Government knows that the efforts exerted by the British and French Governments arise from a real interest. The Czechoslovak Government thanks those Governments very sincerely. But, for reasons enumerated above, it addresses to them a new and last appeal, and asks them to reconsider their point of view. ...

See also Hoensch (f.n.3), p. 96.

On September 21 the British and French ambassadors made oral statements as to the attitude of their countries. According to a request of the Prague Government these oral statements were accompanied by written notes. The British note reads in part:

If on reconsideration the Czechoslovak Government feel bound to reject this advice, they must of course be free to take any action that they think appropriate to meet the situation that may thereafter develop.

The French Government, on the other hand, frankly admitted:

La France, d'accord avec l'Angleterre, a mis sur pied la seule procédure qu'elle a jugé en fait, dans les circonstances actuelles, propre à empêcher l'entrée des Allemands en Tchécoslovaquie. En repoussant la proposition franco-britannique, le Gouvernement tchèque prend la responsabilité de déterminer le recours à la force de l'Allemagne.³³

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33. Celovsky (f.n.29), p. 370. E.t.: In agreement with Great Britain France has suggested the only possible solution to prevent a German invasion under the present circumstances. In the case of refusing to accept the French and British suggestions, the Czechoslovak government bears the full responsibility if German should be determined to resort to force.

Text of the Note from the British Government to the Czechoslovak Government:

"In the view of His Majesty's Government the Czechoslovak Government's reply in no way meets the critical situation which the Anglo-French proposals were designed to avert and if adhered to would, when made public, in the opinion of His Majesty's Government lead to an immediate German invasion. His Majesty's Government therefore urge the Czechoslovak Government to withdraw this reply and urgently consider an alternative that takes account of realities. The Anglo-French proposals remain, in their view, the only chance of avoiding an immediate German attack.

On the basis of the reply now under consideration His Majesty's Government would have no hope of any useful result ensuing from a second visit to Herr Hitler and the Prime Minister would be obliged to cancel the arrangement for it. They therefore beg the Czechoslovak Government to consider urgently and seriously before producing a situation for which His Majesty's Government could take no responsibility.

His Majesty's Government would of course have been willing to put the Czechoslovak proposal for arbitration before the German Government if they had thought that at this stage there was any chance of its receiving favourable consideration. But they cannot for a moment believe that it would be acceptable now nor do they think that the German Government would regard the position as one that is capable of being settled by arbitration as the Czechoslovak Government suggest.

If on reconsideration the Czechoslovak Government feel bound to reject this advice, they must of course be free to take any action that they think appropriate to meet the situation that may thereafter develop" (Documents on British Foreign Policy, 1919-1939, Third Series, Vol. II., p. 442-3).

After these developments the British and French demands were first discussed by the President and his political Ministers, then in the enlarged circle of the whole Cabinet and finally in the twenty member Committee of the Czechoslovak Parliament.³⁴

On September 21 the Prague Government handed over their official reply to the British and French ambassadors. This note reads, as follows:

Forcé par les circonstances et les insistences excessivement pressantes et à la suite de la communication des gouvernements français et britannique du 21 septembre 1938, dans laquelle les deux gouvernements ont exprimé leur manière de voir au sujet de l'assistance à la Tchécoslovaquie si elle refusait d'accepter les propositions franco-britanniques et serait à la suite de cela attaquée par l'Allemagne, le gouvernement tchécoslovaque accepte dans ces conditions avec des sentiments de douleur les propositions françaises et britanniques en supposant que les deux gouvernements feront tout pour les faire appliquer avec toute sauvegarde des intérêts vitaux de l'État tchécoslovaque. Il constate avec regret que ces propositions ont été élaborées sans la consultation (préalable) du gouvernement tchécoslovaque.

Regrettant profondément que sa proposition d'arbitrage n'a pas été acceptée, il les accepte comme un tout, en soulignant le principe de la garantie, comme elle est formulée dans la note et les accepte en supposant que les deux gouvernements ne toléreront pas l'invasion allemande sur le territoire tchécoslovaque qui restera tchécoslovaque jusqu'au moment où le transfert du territoire après la fixation de la nouvelle frontière par la commission internationale dont on parle dans les propositions, pourra être effectué. Il est d'avis que la proposition franco-britannique suppose que

34. Celovsky, Ibid., p. 371.

tous les détails de la réalisation pratique des propositions franco-britanniques seront fixé d'accord avec de gouvernement tchéco-slovaque.³⁵

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35. Documents on British Foreign Policy 1919-1939, Third Series, Vol. II, pp. 447-8.

E.t.: Forced by the circumstances and by excessively urgent pressure and as a result of the communication of the French and British Governments on September 21, 1938, in which the two Governments express their attitude on the subject of assistance to Czechoslovakia in the event of her refusal to accept the Franco-British proposals and being, as a result, attacked by Germany, the Czechoslovak Government accepts, in these conditions, with feelings of grief, the French and British proposals in the belief that the two Governments will do everything to have them put into force with every safeguard for the vital interests of the Czechoslovak State. It notes with regret that these proposals were elaborated without (prior) consultation with the Czechoslovak Government.

Regretting profoundly that its proposal for arbitration has not been accepted, the Czechoslovak Government accept the proposals as a whole, while emphasizing the principle of guarantee as it is formulated in the note, and accepts them in the belief that the two Governments will not tolerate a German invasion of Czechoslovak territory, which will remain Czechoslovak until the moment when the transfer of the territory becomes possible, after the new frontiers have been fixed by the international commission referred to in the proposals.

The Czechoslovak Government is of the opinion that the Franco-British proposal presupposes that all details relating to the practical execution of the Franco-British proposals will be settled in agreement with the Czechoslovak Government (Authors translation. An incomplete translation of the document in the form of a telegram from Mr. Newton (Prague) to Viscount Halifax is to be found in: Documents on British Foreign Policy, Ibid., p. 447).

The next day Chamberlain, the British Prime Minister, and Hitler met at Godesberg³⁶ because, though the German demands had been accepted by Prague, a constructive agreement between the Western powers and Czechoslovakia had not been achieved thus far. Meanwhile Poland and Hungary had officially brought forward their own territorial claims.

Hitler demanded that the annexation of the Sudeten German territories must be carried out not later than October 1.²⁷ Czechoslovakia ordered the general mobilization.³⁸ Chamberlain requested Hitler (on September 23, while still at Godesberg) to hand over to him a Memorandum which would contain the German suggestions and which he would then forward to the

36. Hoensch (f.n.3), p. 97.

37. Ibid., p. 98.

38. The Czech population of Czechoslovakia used the (at least) verbal surrender of the Prague Government to the Anglo-French demands as the occasion for protest demonstrations. Further, they demanded a military dictatorship under General Syrový who was, in point of fact, subsequently appointed Premier (Hoensch (f.n.3), p. 97).

Prague Government.³⁹

The Memorandum⁴⁰ which was handed over in consequence of this request, the Godesberg Memorandum, stated that for a final settlement of the boundary-line a plebiscite would be necessary, preparations for which, however, would take considerable time. Nonetheless it was pointed out that the general situation in the Sudetenland was completely intolerable and had become a danger to European peace.

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39. Akten zur Deutschen Auswärtigen Politik 1918-1945, Nr. 574, p. 712.

Certainly there is no doubt that during the conference with the British Prime Minister Hitler threatened to solve the Sudeten German question by invading the Sudeten German territory of Czechoslovakia. This follows not only from the wording of the common message sent by the British and French Governments to the President of Czechoslovakia on September 18, but also from the letter Chamberlain sent Hitler on September 23, which reads as follows:

"In the meantime, until I can receive their reply, I should be glad to have Your Excellency's assurance that you will continue to abide by the understanding, which we reached at our meeting on September 14th and again last night, that no action should be taken, particularly in the Sudeten territory, by the force of the Reich to prejudice any further mediation which may be found possible."

Czechoslovakia was then informed of Hitler's threat (Akten, Nr. 523, p. 664-5; Nr. 574, p. 712; Letter of Mr. Chamberlain to Mr. Benes, September 27, 1938, published in Laffan-Toynbee, loc.cit. p. 411).

40. Ibid., Nr. 584, pp. 724-6.

The President of the United States in a note of September 26, 1938 wrote to Hitler: "I most earnestly appeal to you not to break off negotiations looking to a peaceful, fair and constructive settlement of the questions at issue, I earnestly repeat that so long as negotiations continue differences may be reconciled" (Akten, Nr. 632, pp. 767-8).

Under these circumstances it was therefore absolutely necessary to carry out the envisaged transfer of the Sudeten territory without any further delay. An equitable arrangement had to be completed and, consequently, the territories marked on an enclosed map⁴¹ were to be occupied immediately by German troops. The remaining area would remain under Czechoslovak military control. Further adjustments of the boundaryline could be made at a later date by public vote. To this end the German Government proposed the following:

1. Withdrawal of the Czechoslovak armed forces, police forces and customs-officers from the marked area which was to be transferred to Germany on October 1, 1938.
2. The ceded territory was to be handed over in its present state. A Czechoslovak representative would co-operate during the procedure with the German headquarters.
3. All German members of the Czechoslovak armed forces and the police were to be dismissed.
4. All German nationals who were imprisoned on grounds of political crimes were to be set free.
5. A public vote supervised by an international commission which was responsible as well for determining subsequent adjustments of the frontier

41. See Map No. 1 in the Annex (Celovsky, (f.n.29), pp. 483-5).

was to be held not later than November 25, 1938.

While the vote was taken troops on both sides were to be withdrawn.

6. For the settlement of all further details a German-Czechoslovak Commission was to be established.⁴²

On September 25, the Prague Government rejected these proposals after 1,5 million men had been called to arms by general mobilization. Thus the danger of war had reached its zenith and Hitler threatened that Germany would also order general mobilization on September 28, at 2 p.m.⁴³

42. British White Paper, Cmd. 5847, No. 6; Akten Nr. 584, p. 724-6.

43. Hoensch (f.n.3), p. 98-9; Wright (f.n.7), p. 27.
A resolution of the General Assembly of the League of Nations of September 29, 1938 runs as follows:

"Representatives of forty-nine States meeting as delegates to the Assembly of the League of Nations have watched with deep and growing anxiety the development of the present grave situation in Europe.

The Assembly is convinced that the existing differences are capable of being solved by peaceful means. It knows that recourse to war, whatever be its outcome, is no guarantee of a just settlement and that it must inevitably bring untold suffering to millions of individuals, and imperil the whole structure of civilization in Europe.

The Assembly, therefore, voicing the prayer of the peoples of all countries, expresses the earnest hope that no Government will attempt to impose a settlement by force.

The assembly welcomes with great satisfaction the action taken by the President of the United States of America and fully associates itself with the spirit which inspired it" (League of Nations, Official Journal, Special Supplement No. 183, Records of the nineteenth ordinary session of the Assembly, pp.94-5).

It is a historical fact that towards the end of 1937 Hitler had already forged his plans of aggression against Czechoslovakia. The most important evidence to support this is provided by the so-called Hossbach Memorandum which states:

Der Führer führte...aus: Das Ziel der deutschen Politik sei die Sicherung und die Erhaltung der Volksmasse und deren Vermehrung. Somit handele es sich um das Problem des Raumes... Zur Lösung der deutschen Frage könne es nur den Weg der Gewalt geben, dieser niemals risikolos sein. ...Zur Verbesserung unserer militär-politischen Lage müsse in jedem Fall einer kriegerischen Verwicklung unser 1. Ziel sein, die Tschechei und gleichzeitig Österreich niederzuwerfen. ...Sei die Tschechei niedergeworfen, ...so könne eher mit einem neutralen Verhalten Polens in einem deutsch-französischen Konflikt gerechnet werden...Der Zeitpunkt unseres Angriffs auf die Tschechei und Österreich müsse abhängig von dem Verlauf des italienisch-englisch-französischen Krieges gemacht werden. ... Der Führer...wolle in eigener Selbständigkeit... den Feldzug gegen die Tschechei beginnen und durchführen, wobei der Überfall auf die Tschechei "blitzartig schnell" erfolgen müsse. ...Hinsichtlich unserer Offensive nach Südosten machte Feldmarschall von Blomberg nachdrücklich auf die Stärke der tschechischen Befestigungen aufmerksam...Generaloberst von Fritsch erwähnte, dass es gerade der Zweck einer durch ihn angeordneten Studie dieses Winters sei, die Möglichkeiten der Führung der Operationen gegen die Tschechei unter besonderer Berücksichtigung der Überwindung des tschechischen Festungssystems zu untersuchen....44

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44. Excerpts of Notes on the Conference in the Reichskanzlei on November 5, 1937, Der Prozess gegen die Hauptkriegsverbrecher vor dem Internationalen Militärgerichtshof, pp. 402-13 (402), Dok. 386-PS), 44.
 E.t.: The Führer ... stated: The aim of German policy is the security and the preservation of the nation and its propagation. This is consequently a problem of space... The German question can be solved only by means of force, and this is never

without risk...For the improvement of our military political position it must be our first aim, in every case of entanglement by war, to conquer Czechoslovakia and Austria simultaneously,... Once Czechoslovakia is conquered...then a neutral attitude by Poland in a German-French-conflict could more easily be relied upon...The date of our attack on Czechoslovakia and Austria must be made independent of the course of the Italian-French-English war... The Fuehrer...in complete independence wishes to begin to carry out operations against Czechoslovakia. The attack on Czechoslovakia would have to take place with the "speed of lightning". With regard to our offensive in a South-easterly direction, Field Marshal von Blomberg drew special attention to the strength of the Czechoslovak fortifications,... Generaloberst von Fritsch mentioned that it was the purpose of a study which he had laid out for this winter to investigate the possibilities of carrying out operations against Czechoslovakia with special consideration of the conquest of the Czechoslovak system of fortifications....

Note: Sentence two of the German text is grammatically not quite correctly formulated. In the document cited it should read: "...nur den Weg der Gewalt geben, der niemals risikolos..."

Zourek writes, that

during the Nuremberg Trial it was convincingly proved that the Nazi conspiracy against peace, which occasioned the Second World War, also comprised aggression against Czechoslovakia. The preparations for this aggression began during secret deliberations held with Hitler in the Chancellery of the Reich on November 5, 1937, and probably earlier. During these deliberations armed aggression against Czechoslovakia was planned --the so-called "Case Green".⁴⁵ On May 30, 1938 Hitler declared his irrevocable decision to exterminate Czechoslovakia by military action in the immediate future.⁴⁶

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45. Time of attack "Gruen", conference-note: Document 388-PS, Berlin, 27.9.38:

"Geheime Kommandosache... Gemeinsame Angriffszeit von Heer und Luftwaffe angestrebt... Eine nach dem Heer liegende Angriffszeit der Luftwaffe verhindert jede taktische Überraschung der feindlichen Luftwaffe und bedingt gewisse Änderungen des Angriffsverfahrens... Wenn man die frühe Angriffszeit des Heeres als unumgängliche Notwendigkeit ansieht, muss unter Umständen auf einen gleichzeitigen Angriff der Luftwaffe... verzichtet werden. Daher Vorschlag: Angriff des Heeres -unabhängig von dem Angriff der Luftwaffe- zu dem von ihm gewünschten Zeitpunkt- 6,15 Uhr und Genehmigung, dass vorher einzelne Teilunternehmungen stattfinden können, jedoch nur in solchen Ausmassen, dass nicht die gesamte tschechische Front alarmiert wird. Angriff der Luftwaffe zu dem ihr möglichen Zeitpunkt. (Der Prozess gegen die Hauptkriegsverbrecher, p. 528-9).

E.t.: Top secret...strive after coordinated time of attack by Army and Air Forces. ... As a matter of principle, every effort should be made for a coordinated attack by army and air forces on X day ... If the Luftwaffe were to attack at the time desired by the Army no tactical surprise of the enemy's air force would be achieved and it would necessitate certain changes in the method of attack ... If an early hour of attack on the part of the army is regarded as indispensable, a simultaneous attack by the air forces, --desirable as it may be may possibly have to be dispensed with... Thus it is proposed: attack by the Army - independent of the attack by the air force - at the time desired by the Army (0615) and permission for limited operations to take place before then, however, only to an extent that will not alarm the entire Czech front. The Luftwaffe will attack at a time most suitable to them.

46. Unrichtige Ansichten über das Münchener Abkommen in Kimminich, pp. 45-6. Original texts: Czech and German.

Zourek is referring here to the passage of the Nuremberg Judgement dealing with the occupation of Czechoslovakia.⁴⁷

4) The Munich Agreement and the Territorial Changes

In the grave situation Mussolini suggested a Conference to be held at Munich between Great Britain, France, Italy and Germany. The Prague Government was invited to delegate an observer who, however, was not permitted to participate in the negotiations.

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47. "The conference of the 5th November 1937 made it quite plain that the seizure of Czechoslovakia by Germany had been definitely decided upon. The only question remaining was the selection of the suitable moment to do it...On the 21st April 1938, a discussion was held between Hitler and the defendant Keitel with regard to "Case Gruen", showing quite clearly that the preparations for the attack on Czechoslovakia were being fully considered. On the 28th May 1938, Hitler ordered that preparations should be made for military action against Czechoslovakia by the 2nd October, and from then onwards the plan to invade Czechoslovakia was constantly under review. On the 30th May 1938 a directive signed by Hitler declared his "unalterable decision to smash Czechoslovakia by military action in the near future...On the 31st August 1938, Hitler approved a memorandum by Jodl dated 24th August 1938, concerning the timing of the order for the invasion of Czechoslovakia and the question of defense measures. This memorandum contained the following: Operation Green will be set in motion by means of an 'incident' in Czechoslovakia, which will give Germany provocation for military intervention. The fixing of the exact time for this incident is of the utmost importance...These facts demonstrate that the occupation of Czechoslovakia had been planned in detail long before the Munich Agreement" (Nazi Conspiracy and Aggression, Opinion and Judgement, pp. 24-26). German text: Das Urteil von Nürnberg, pp. 50.

The result of the Conference was the Agreement among the four Powers signed on September 29, 1938.⁴⁸ This agreement, which in a more restricted sense represents the famed Munich Agreement, contains, however, only a part of the settlements which are usually included under the expression "Munich Agreement", namely that hitherto Czechoslovak territory was to be transferred to Germany, Poland and Hungary. The understanding achieved in Munich does not, however, impose any obligation on the part of Czechoslovakia to transfer these territories, although it presupposes that an agreement of that kind had already been reached. The purpose of the understanding was merely to formulate the conditions and modalities of the transfer.⁴⁹

According to this, the evacuation of the territories in question was to commence on October 1, 1938 and was to be completed without any disturbances or delay by October 10, 1938. An International Commission consisting of the representatives of the four Conference Powers and Czechoslovakia was to work out detailed provisions concerning the evacuation. However, it must be taken into consideration that an essential part of the settlement, including detailed dates of the German occupation, had already been fixed in the Munich Agreement.

48. Hoensch, Ibid., p. 99-100; Document No. 6.

49. Strupp-Schlochauer, Bd. 2, p. 554; Wheeler-Bennett, Sketch Map based on the map annexed to the agreement signed at Munich on September 29, 1938, after p. 464.

The international commission was to determine the exact date and the area where a plebiscite would be held. In addition, the final settlement of the new boundaries was to be within the competence of this commission.

Finally, a right of option to emigrate from or to immigrate to the transferred territories was granted to the population, and the Czechoslovak Government was obliged to dismiss all Sudeten Germans from the armed forces and the police.

In an Annex to the Agreement it was confirmed that the Governments of the United Kingdom and France would maintain their offer as expressed in paragraph 6 of the Anglo-French proposals of September 19, 1938, which concerned the international guarantee of the new boundaries of Czechoslovakia in the case of unprovoked attack.

Germany and Italy were also expected to guarantee Czechoslovak security as soon as the question of the Polish and Hungarian minorities had been settled. In an additional Declaration the Conference Powers expressed the view that the question of the Polish and Hungarian minorities in Czechoslovakia would have to be the subject of a further conference among the four powers if these problems were not settled within three months.⁵⁰

50. Document No. 6 (Declaration of the Heads of Government of the Four Powers).

On September 30, 1938 the Czechoslovak Government in separate notes addressed to the Governments of Great Britain, France and Italy declared their consent to the Agreement.⁵¹

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51. Kral (f.n.14), p. 27; Zourek, Unrichtige Ansichten über das Münchener Abkommen, p. 45; Wright (f.n.7), p. 28: "The Czech Government accepted this virtual ultimatum..."

Document: The (German) Chargé d'affaires in Czechoslovakia (Henecke) to the Foreign Ministry, Excerpt of a telegram, Prague, September 30, 1938-9 p.m.

"The Italian Minister here gave me the following information regarding today's démarches by the Ministers of Italy, Britain, and France. He personally had received orders from his Government early this morning to see either the President of the Republic in person or some other high Czechoslovak official and to advise him urgently to accept the Munich agreements and to avoid incidents of any kind during the evacuation of the Sudeten-German area. As the President was at the Council of Ministers, he was received by Samakt, Chief of the Presidential Chancellery, who promised to convey his recommendation to Benes at once. On this occasion the Italian Minister also conveyed the wish of the Ambassadors in Berlin of Italy, Britain, and France that Minister Mastny (Czechoslovak Minister in Germany) should be appointed Czechoslovak delegate.

...At their own request the Ministers of Italy, Britain, and France were received in a body about noon today by the Foreign Minister, who...said:

"The President and the Government submit to the conditions of the Munich Agreement which has come into being without Czechoslovakia and against her. The Czechoslovak Government reserves the expression of its attitude in writing." At the same time Krofta asked the Ministers to use their influence with the Reich Government for the cessation of anti-Czech propaganda which was making difficult the execution of the Munich Agreement. ..." (Documents on German Foreign Policy, 1918-1945, Series D, Vol. IV, pp. 4-5).

An official report was also published on September 30, containing what was from the German view the official Czechoslovak comment on the Munich four power agreement:

The Government of the Republic held a meeting at the castle this morning under the chairmanship of the President of the Republic. The purpose of the meeting was to give full consideration to the international situation as created by the four power agreement concluded in Munich on September, 29.

The Government has closely examined this accord as well as all aspects which need to be taken into consideration in this connection. After detailed consultations and deliberation of the recommendations made by the British and French Governments, and conscious of its historical responsibility, the Czechoslovak Government - after obtaining the full approval from the representatives of the political parties - has decided to accept the Munich four power agreement. She has taken this decision aware of the necessity to maintain the nation as such, and of the fact that any other decision seems out of the question.

While announcing their consent, the Government of the Czechoslovak Republic wish to protest before the whole world against decisions made unilaterally and in its absence.

(E.t. according to the German translation in the book of Spengler, Zur Frage des völkerrechtlich gültigen Zustandekommens der deutsch-tschechoslowakischen Grenzregelung von 1938, p. 58).

Mr. Chamberlain said clearly during the Parliamentary Debate of October 3, 1938, that Czechoslovakia had accepted the Anglo-French proposals. He stated: "The first is this: We did not go there to decide whether the predominantly German areas in the Sudetenland should be passed over to the German Reich. That had been decided already. Czechoslovakia had accepted the Anglo-French proposals. What we had to consider was the method, the conditions and the time of the transfer of the territory" (Extract of Speech by the Rt. Hon. Neville Chamberlain, Prime Minister, October 3, 1938, Documents on International Affairs, 1938, Vol. II pp. 292-3, by Curtis).

According to the provisions of the Agreement, the International Commission was thereupon established. It was within this commission that on November 20, 1938 the Czechoslovak Government and the Government of the Reich agreed on the final settlement of their common boundaries without holding a plebiscite. This agreement was recorded in a memorandum of the same day and accepted at the Commission's session on November 21, 1938.⁵²

52. Ninth Session of the International Commission, November 21, 1938, (excerpts)...

"In the absence of State Secretary von Weizsaecker, Ambassador Ritter acted as chairman and opened the meeting.

The chairman began by recalling the resolution of the International Commission on October 13 that the work of rectifying and finally delimiting the frontier should be begun at once by the German and Czechoslovak Governments. These negotiations had now resulted in an agreement which was embodied in a memorandum signed by the leaders of both delegations on November 20, 1938.

The Czechoslovak Minister confirmed this statement. He recalled the words of State Secretary von Weizsaecker at the opening of the first session of the International Commission when he expressed the wish that the deliberations of this Commission should be conducted in a spirit of friendship and reconciliation. This wish expressed by the State Secretary had greatly helped the work of the Commission, and the Czechoslovak delegation would like to record that they too had been inspired by this spirit in the course of the negotiations. The Czechoslovak delegation naturally had had to defend their vital interests, while at the same time taking into account that a state which gives up part of its population on the basis of the nationality principle has to sacrifice not only large territorial but also economic interests. These sacrifices had been very heavy, and the Czechoslovak delegation could not conceal the feelings of deep grief which filled the hearts of the Czechoslovak people. In submitting

to these stern necessities, however, the Czechoslovak delegation did not fail to appreciate that these sacrifices offered on the altar of peace dispelled the unrest of the past in order to bring peace in the future. The Czechoslovak delegation, therefore, looked more to the future than to the past. It was this spirit which had inspired the Czechoslovak Delegation in their work with the German delegation, the result of which was now submitted to the International Commission. He had nothing to add to this result. He would, however, take the liberty of expressing the firm conviction of the Czechoslovak Government that the sacrifices made by Czechoslovakia might contribute to establishing good neighbourly relations as well as bonds of friendship and profitable cooperation with Greater Germany.

The chairman expressed his thanks to the Czechoslovak Minister for having brought the negotiations on this important matter to a close in the same spirit of reconciliation and friendship in which State Secretary von Weizsaecker had opened them. The members of the International Commission appreciated the remarks of the Czechoslovak Minister on the sacrifices made by the Czechoslovak State. He pointed out that Germany, too, compared with her expectations, had made sacrifices. It was also painful for Germany and the German race (Volkstum) that so many Volksdeutsche remained outside the frontiers of the German Reich. He agreed with the Czechoslovak Minister that the two states would render themselves and Europe the best service by now devoting themselves entirely to the tasks of the future. The Government of the Reich was prepared to enter into good neighbourly and friendly cooperation with Czechoslovakia. The agreements on various subjects concluded in the last few days already gave proof of this willingness.

The chairman referred to paragraph 6 of the Munich Agreement. In the absence of statements to the contrary, he assumed that the frontier between the German Reich and Czechoslovakia could now be regarded as final. He proposed that this resolution be formally recorded in the minutes of the meeting in the following terms:

"The International Commission has today taken cognizance of the minutes of November 20, relating to the delimitation of the German-Czechoslovak frontiers by the German and Czechoslovak delegations

as well as of the maps appended to this record. It declares that the frontier marked on these maps is the final frontier within the meaning of paragraph 6 of the Munich Agreement." ...

The chairman noted...that the proposed text had been accepted. This text would be incorporated in the minutes of the meeting. Further, in accordance with a wish expressed by the Commission, the resolution was signed by the five members of the International Commission" (Documents (Germany) Ser. D, Vol. IV, pp. 164-5).

The French and British representatives on the commission expressed their satisfaction that direct agreement had been reached between the two Governments concerned.⁵³

Meanwhile, on October 2, Poland occupied the territory of Teschen.⁵⁴ The Governments of Czechoslovakia and Hungary agreed that Germany and Italy should arbitrate

53. Documents (Germany) pp. 164-5.

54. A Note Verbale from the British Embassy in Berlin October 1, 1938 (Polish Ultimatum) was handed to the Foreign Ministry with the following text:

"According to information which has reached the Foreign Office, the Polish Government has delivered an ultimatum to the Czechoslovak Government demanding immediate satisfaction of their territorial claims. If a satisfactory reply is not received by noon to-day, Poland proposes to invade Czechoslovakia to-morrow.

Mr. Chamberlain regards this procedure as being wholly contrary to the spirit of the Agreement reached at Munich which provided that the settlement of the territorial problems in Czechoslovakia should be achieved by negotiation and not by force. Ample provision is made in the Agreement for the settlement of Polish claims.

The British Government is making immediate representations in this sense at Warsaw. Mr. Chamberlain would be grateful if the German Government would use their influence to induce the Polish Government to defer action and to seek satisfaction in the spirit of the Munich Agreement" (Documents (Germany), Ser. D, Vol. IV, p. 7).

and settle the Hungarian territorial claims. This was done by the Arbitration of Vienna, on November 2, 1938.⁵⁵

55. Hoensch (f.n.3), p. 101. Complete text of the Arbitral Award:

"1. The areas to be ceded to Hungary by Czechoslovakia are marked on the annexed map. Demarcation of the frontier on the spot is delegated to a Hungarian-Czechoslovak Commission.

2. The evacuation by Czechoslovakia of the areas to be ceded and their occupation by Hungary begins on November 5, 1938, and is to be completed by November 10, 1938. The detailed stages of the evacuation and occupation, as well as other procedures connected therewith, are to be settled at once by a Hungarian-Czechoslovak Commission.

3. The Czechoslovak Government will insure that the territories to be ceded are left in an orderly condition at the time of evacuation.

4. Special questions arising out of the cession of territory, in particular questions relating to nationality and option, are to be regulated by a Hungarian-Czechoslovak Commission.

5. Likewise, special measures for the protection of persons of the Magyar nationality remaining in Czechoslovak territory and of persons not of the Magyar race in the ceded territories are to be agreed upon by a Hungarian-Czechoslovak Commission. This Commission will take special care that the Magyar ethnic group (Volksgruppe) in Pressburg be accorded the same status as other ethnic groups there.

6. Insofar as disadvantages and difficulties in the sphere of economics or (railway) traffic may be caused by the cession of territory to Hungary for the area remaining to Czechoslovakia, the Hungarian Government will, in agreement with the Czechoslovak Government, do its utmost to remove these disadvantages and difficulties.

7. In the event of difficulties or doubts arising from the implementation of this award, the Royal Hungarian and Czechoslovak Governments will settle the matter directly between themselves. Should they, however, fail to reach agreement on any question, this question will then be submitted to the German and Italian Governments for final decision" (Documents (Germany), Ser. D., Vol. IV, pp. 125-6).

The guarantees of the four Conference Powers to maintain the integrity of the rest of the Czechoslovak State envisaged in the Annex to the Agreement were not confirmed by any party.⁵⁶ After the settlement of the Polish and Hungarian territorial claims the Czechoslovak Government addressed the Conference Powers on the subject of the promised guarantee. None of them, however, showed willingness to fulfill the promise.

5) The Dissolution of Czechoslovakia

Slovakia, which, according to the Agreement of Sillein of October 6, 1938, enjoyed an autonomous status within the Czechoslovak State, declared its independence on March 14, 1939 after a constitutional crisis had broken out on March 9, 1939 and the Central Government at Prague suspended the regional government and intervened militarily.

On March 15, 1939 the Prague Government sent Hacha, the President of Czechoslovakia, on a mission to Berlin.⁵⁷ There Hacha was forced "to put the fate of the Czech

56. Staatslexikon, Recht, Wirtschaft, Gesellschaft, 10. Bd. 2. Erg. Bd. col. 687.

57. Kral (f.n.14), p. 40.

people and country into the hands of the Führer of the German Reich."⁵⁸

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58. Document No. 9; Markus, Le traité germano-tchécoslovaque du 15 Mars 1939, loc.cit. p. 658.

It is well imaginable that Hacha was brutally pressured into signing. Even a report which the Hitler government drew up on the talks between Hitler and Hacha alludes to this pressure, though of course such a biased report makes no mention of the worst means of pressure used.

In this regard the Nuremberg Tribunal mentioned the following:

"On the 14th March 1939, the Czech President Hacha and his Foreign Minister Chvalaskovsky came to Berlin at the suggestion of Hitler, and attended a meeting at which the defendants von Ribbentrop, Göring, and Keitel were present, with others. The proposal was made to Hacha that if he would sign an agreement consenting to the incorporation of the Czech people in the German Reich at once, Bohemia and Moravia would be saved from destruction. He was informed that German troops had already received orders to march and that any resistance would be broken with physical force. The defendant Göring added the threat that he would destroy Prague completely from the air. Faced by this dreadful alternative, Hacha and his Foreign Minister put their signatures to the necessary agreement at 4:30 in the morning, and Hitler and Ribbentrop signed on behalf of Germany (Toynbee, loc.cit. p. 50). Kempner refers to an interrogation of Meissner, the head of the Presidential Chancery, during the Nürnberg "Wilhelm Strasse" trial in 1949 at which time Meissner said:

"Es ist wahr, dass Hacha im Laufe der Nacht einen Schwächeanfall hatte und dass er ärztliche Hilfe bekam, nach der er sich wieder verhandlungsfähig erklärte". (E.t.: It is true that Hacha had an attack of faintness during the night and that he received medical assistance, after which he declared himself fit to resume negotiations). Kempner, Das Dritte Reich im Kreuzverhör, p. 171; Nazi Conspiracy and Aggression, p. 27; Judicial Decisions, A.J.I.L. 1947 pp. 196-7.

Immediately on the following day the law which established the Protectorate of Bohemia and Moravia was passed; according to this these Czechoslovak territories became part of the German Reich.⁵⁹ Furthermore a treaty was signed with the newly "independent" Slovak State which placed Slovakia under the protection of the Reich as a guarantee for her independence and the integrity of her territory.⁶⁰ Ruthenia was taken over by Hungary.⁶¹

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59. Hitler always launched his propaganda campaign for the Sudeten German territories with an appeal to the right of self-determination. And according to world opinion this was the only justification for the cession of a part of Czechoslovakia to Germany.

The British Prime Minister explained in his statement of March 15, 1939: "...I cannot regard the manner and the method by which these changes have been brought about as in accord with the spirit of the Munich Agreement... . Hitherto the German Government in extending the area of their military control has defended its action by the contention that they were only incorporating in the Reich neighbouring masses of people of German race. Now for the first time they are effecting a military occupation of territory inhabited by people with whom they have no racial connection."

Hitler himself had asserted during the negotiations with the British Prime Minister:

"We don't want Czechs in the Reich", and, "We have no further territorial ambition", as Chamberlain said in his speech in Birmingham on March 17, 1939. (Kennedy, Why England Slept, p. 186; Bolton, p. 141; v. Richthofen, loc.cit. p. 45; Toynbee, loc.cit. pp. 62, 69).

60. Document No. 10.
61. Kennan (f.n.9), p. XX.

The most important States of the World did not recognize the annexation of the rest of Czechoslovakia. On March 17, 1939 the British Government addressed to the Government of the Reich a note which stated that, "...they cannot but regard the events of the past few days as a complete repudiation of the Munich Agreement..." Likewise, the French Government protested against these measures, indicating that these actions represented an obvious violation of both the letter and spirit of the Munich Agreement of September 29.⁶²

The two Governments at first merely pointed out the violations of the agreement without drawing any juridical or political consequences therefrom. It was not until the war that the consequences were drawn. The first step was taken by the British Government with a note of August 5, 1942 which stated:

As Germany has deliberately destroyed the arrangements concerning Czechoslovakia reached in 1938... His Majesty's Government regards themselves as free from any engagements in this respect.⁶³

62. Toynbee, Documents on International Affairs, pp. 71-2; Document No. 11.

63. Document No. 14.

The point of view of the Czechoslovak government-in-exile concerning the Munich Agreement was, however, by no means formulated on the basis of "ex-tunc nullity."

When Benes, who had resigned as President of Czechoslovakia in 1938, formed the Czechoslovak government-in-exile in London after the outbreak of war, this government was recognized by the allied powers as the legitimate Government of the Czechoslovak State. Mr. Benes issued on November 17, 1939 a communiqué which declared that the arbitrary agreement between Hitler and Hacha of March 15, 1939 was void but which did not however imply that the Munich Agreement itself was void. He said (cit. french newspaper "Le Temps", November 19, 1939): "Par les accords de Munich..., M. Hitler s'engageit formellement à garantir les nouvelles frontières de la Tchécoslovaquie". E.t.: With the agreement of Munich..., Herr Hitler has formally undertaken the obligation to guarantee the new voundaries of Czechoslovakia.

On the contrary, we can see that the voidness of the Agreement of March 15, 1939 is explained by the argument that in the Munich Agreement Hitler had formally undertaken obligations to guarantee the new boundaries of Czechoslovakia. It is obvious that this document argues on the basis of the validity of the obligations formulated in the Munich Agreement.

Even when the British Government informed the Czechoslovak government-in-exile of their new attitude - "as Germany has deliberately destroyed the arrangements... His Majesty's Government regards itself as free from any engagements in this respect"- the Czechoslovak government-in-exile did not contradict this interpretation, but declared in an answering note of August 5, 1942:

"My Government accept Your Excellency's note as a practical solution of the questions and difficulties of vital importance for Czechoslovakia which emerged between our two countries as the consequence of the Munich Agreement, maintaining, of course, our political and juridical position with regard to the Munich Agreement and the events which followed it...". (H.M.S.O. Cmd. 6379; Carlyle, loc. cit. pp. 317-9; Document No. 14).

On September 29, 1942 the French National Committee in London informed the Czechoslovak government-in-exile that they regarded the agreement signed in Munich on September 29, 1938 as invalid from the beginning.⁶⁴

After Mussolini's fall the Italian Government also adopted the French point of view. In a declaration of September 26, 1944, the Italian Government expressed its viewpoint in the following manner:

Constatando che la politica del regime fascista nei confronti della Cecoslovacchia fu dontraria non solo alle più nobili tradizioni dell'Italia, ma ai nostri più essenziali interessi, e affermando che tale politica constitui una delle manifestazioni più gravi dell'asservimento del fascismo alla Germania hitleriana, il Governo italiano proclama solennemente che considera nulli e non avvenuti gli accordi di Monaco del 29 settembre 1938, la sedicente decisione arbitrale Ciano-Ribbentrop formulata a Vienna il 2 novembre 1938 e con essi qualsiasi altro atto che, come conseguenza di tali accordi e di tale decisione, abbia mirato a nuocera all'indipendenza della Repubblica cecoslovacca.

Il Governo italiano dichiara, di fronte al mondo ed alla storia che tutti quegli atti e accordi tradirono il pensiero e la volontà del popolo italiano che, finchè libero, volle una politica fidente e feconda collaborazione con la Cecoslovacchia, nell'interesse della pace e della libertà europea.⁶⁵

64. Schickel, Das Münchener Abkommen, loc.cit. p. 26.

65. L'Italia proclama la nullità degli accordi di Monaco del 1938, Notizie Nazioni Unite, N. 34, 27 Settembre 1944, p. 5; see further: Ort, Über die Ungültigkeit des Münchener Diktats, loc.cit. p. 72. E.t.: In consideration of the fact that under the Fascist regime Italian policy toward Czechoslovakia was not only contrary to the noble traditions of Italy but also against our own essential

interests, and admitting that such a policy supported a most grievous enslavement of Czechoslovakia by the Fascists of Hitler's Germany, the Italian Government solemnly declares that they consider the Munich Agreement of September 29, 1938 together with the award made by Ciano and Ribbentrop on November 2, 1938 in Vienna and all other declaratory acts which are to be considered consequences of that Agreement and arbitration null and void, and they regard them as a violation of the independence of the Czechoslovakian Republic.

The Italian Government declares before the whole world and history that all the above mentioned acts and agreements betrayed the intentions and the thinking of the Italian people who with freedom restored desire a policy of trust and fruitful co-operation with Czechoslovakia in the interest of the freedom of Europe.



The attitude of the World Powers which were not signatories of the Munich Agreement is summarized by Bretton⁶⁶ thus:

"...(Les) Etats-Unis ont appliqué la doctrine Stimson en refusant de reconnaître les changements territoriaux imposés à la Tchécoslovaquie non à l'occasion de l'accord de Munich mais lors de l'établissement du 'protectorat' allemand consacrant le démembrement de la Tchécoslovaquie en mars 1939. L'Union Soviétique fit de même,⁶⁷ puis dès juin 1941 affirma la nullité ab initio de l'accord de Munich. Cette position ne s'est pas démentie par la suite: on la retrouve d'abord dans le projet soviétique de traité de paix avec l'Allemagne du 10 janvier 1959⁶⁸, puis dans le mémorandum soviétique adressé à la R.F.A. le 21. novembre 1967 sur le non recours de la force.⁶⁹ Mais c'est dans l'article 6 du traité d'amitié, de coopération et d'assistance mutuelle signé à Prague le 6 mai 1970 par l'U.R.S.S. et la Tchécoslovaquie que figure la condamnation la plus explicite de cet accord: 'les H.P.C. constatent que l'accord de Munich du 29 septembre 1938 a été obtenu sous la menace d'une guerre d'agression et de l'emploi de la force contre la Tchécoslovaquie, qu'il faisait partie de la conspiration criminelle de l'Allemagne nazie contre la paix, qu'il constituait une violation grossière des règles fondamentales du droit international et qu'il est en conséquence nul et non avenue depuis le début avec toutes les conséquences qui en découlent.'"⁷⁰

66. Bretton, Les négociations germano-tchécoslovaque sur l'accord de Munich du 29 septembre 1938, A.F.D.I.P., 1973, pp. 199-200. E.t.: The United States through its refusal to recognize the territorial transfer - in the manner in which it was imposed on Czechoslovakia - has applied the Stimson doctrine. However, this was not done on the occasion of the Munich Agreement but in connection with the creation of the German "protectorate" through which the partition of Czechoslovakia in March 1939 was approved.

The Soviet Union did the same, and as from June 1941 she confirmed the nullity of the Munich Agreement ab initio. She never abandoned this position, even subsequently. One can find it first in a Soviet draft of a peace treaty with Germany dated January 10, 1959, then in a memorandum dated November 21, 1967 on the renunciation of force addressed to the Federal Republic of Germany. However, art. 6 of the Treaty on Friendship, Cooperation and Mutual Help signed in Prague on May 6, 1970 by the USSR and Czechoslovakia, contains a clear condemnation of this agreement: "the sovereign contracting parties hereby declare that the Munich Agreement of September 29, 1938 came into being under the threat of a war of aggression and use of force against Czechoslovakia. These represented part of the criminal conspiracy of Nazi Germany against peace, and constituted a gross violation of the basic rules of international law, thus leading to its nullity from the very first moment of its coming into being and with all the consequences thereof."

67. Text of Note from the Soviet Government to the German Embassy in Moscow, March 18, 1939:

I have the honour to confirm the receipt of your Notes dated March 16 and 17 informing the Soviet Government of the inclusion of the Czech provinces in the German Empire and of the establishment of the German protectorate.

The Soviet Government does not consider it possible to pass over the above-mentioned Notes in silence and thus create a false impression of its allegedly indifferent attitude to Czechoslovak events, and therefore finds it necessary, in answer to the above Notes, to express its real attitude to the aforesaid events.

(1) The political and historical conceptions expounded in the introductory part of the German ordinance (announcing the establishment of the Protectorate) as grounds and justification for it, and in particular the references to the existence of the Czechoslovak State as a source of constant unrest and menace to European peace, to the lack of vitality of the Czechoslovak State and to the resulting necessity for particular care on the part of the German Empire, cannot be considered as correct and corresponding to the facts known to the whole world.

In actual fact, after the First World War the Czechoslovak Republic has been one of the few European States where internal tranquillity and a peaceable foreign policy were really secured.

(2) The Soviet Government is not aware of any State Constitution that entitles the Head of a State to abolish its independent existence as a State without the consent of his people.

It is difficult to admit that any people would voluntarily agree to the destruction of their independence and to their inclusion in another State, still less a people that for hundreds of years fought for their independence and for 20 years maintained their independent existence.

In signing in Berlin the Act of March 15 Dr. Hacha, President of Czechoslovakia, had no authority from his people for doing so, and acted in manifest contradiction with Articles 64 and 65 of the Czechoslovak Constitution.

Consequently the aforesaid Act cannot be considered legally valid (Documents on International Affairs 1939-1946, Vol. I p. 75, by Toynbee).

68. Article 10: "L'Allemagne reconnaît la nullité de l'accord de Munich avec toutes les conséquences qui en découlent et déclare que le territoire de l'ex-région sudète sera reconnu de façon permanente comme partie intégrante du territoire de la République Tchèqueoslovaque." E.t.: Germany recognizes the nullity of the Munich Agreement with all the consequences ensuing from it, and declares that the territory of the former German Sudeten region will be recognized permanently as an integral part of the territory of the Republic of Czechoslovakia.

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69. Article 4: "Vu que l'accord de Munich en date du 29 septembre 1938 a été signé sous la menace d'une guerre d'agression et du recours à la force contre la Tchécoslovaquie, La R.F.A. déclare cet accord nul et non avenu". E.t.:
With regard to the Munich Agreement of September 29, 1938, which was signed under the threat of a war of aggression and use of force against Czechoslovakia, the Federal Republic of Germany declares this agreement to be null and void.
70. Khlestov, New Soviet-Czechoslovak treaty, J.A., 1970 (No. 71), p. 9.

6) The Restitution of the State and the Expulsion
of the Germans

After Germany's collapse in 1945 the Czechoslovak State was restored within its former boundaries.⁷¹

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71. In 1945 the victorious powers thus decreed -pursuant to the supreme powers assumed by them in Germany- that in their future dealing with Germany the position should be taken to be that of December 31, 1937 (Declaration of June 5, 1945). By this act, German sovereignty in all the territories annexed to the German Reich after that date was annulled and the Sudeten territories were returned to Czechoslovakia. Under international law, an actual change in the legal status of these territories thus took place (cf. also Rumpf and Kimminich in: Eastern Treaties-Berlin Status, Munich Agreement Relationship between FRG and GDR, Hamburg 1971, Kiel Symposium, pp. 189 and 183).

The decision of the victorious powers not to consider any of the territories situated outside the Reich's frontiers of December 31, 1937 as part of Germany was later accepted by the Federal Republic of Germany. Consequently, the Federal Republic of Germany and its State organs have never staked a claim to the Sudeten territories; on the contrary, they have always acted as if the territories belonged to the Czechoslovak Confederation. No Federal German Government has in this respect ever raised even a reservation of international law.

The German Constitution, too, does not contradict in any way, through various territorial statements, the attitude adopted by the Federal Republic of Germany towards Czechoslovakia. The reunification mandate specifically does not extend to those territories which - as with the Sudeten territory - lie outside the German frontiers of December 31, 1937.

Only the Carpathian part of Ruthenia⁷² was annexed by the Soviet Union.⁷³

In the course of the diplomatic events of the immediate post-war period the German Democratic Republic in a common declaration with the Czechoslovak Republic of June 23, 1950 made the following statement:

Unsere beiden Staaten haben keine Gebiets- oder Grenzansprüche und ihre Regierungen betonen ausdrücklich, dass die durchgeführte Umsiedlung der Deutschen aus der Tschechoslovakischen Republik unabänderlich, gerecht und endgültig gelöst ist.⁷⁴

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72. "...eine Provinz, die in der Tat nicht einen einzigen Tschechen oder Slowaken aufweist und die ausschliesslich von Ruthenen und Magyaren bewohnt ist" (von Papen, Der Wahrheit eine Gasse, p. 620). E.t.:...a province where indeed not a single Czech or Slovak is living and which is exclusively inhabited by Ruthenians and Magyars.
73. Article 1 of the relevant Treaty of June 29, 1945 between the Soviet Union and the Czechoslovak Republic states that this region "has been reunited with the Ukraine" (French text of the Treaty with supplementary Protocol (same date) in Colliard, Actualité internationale et diplomatique 1950-1956, Vol. II pp. 609-11).
74. Document No. 15; E.t.: Our two States have no territorial or boundary claims against one another and our Governments explicitly emphasize that the evacuation of Germans from the Czechoslovak Republic has to be considered irrevocable, legitimate and definitive. See also Königer, Die Stellung der beiden deutschen Staaten zum Münchener Abkommen von 1938, loc.cit. pp. 1051.

This declaration does not contain any reference to the question of the validity or nullity of the Munich Agreement.

However, in Article 7 of the Treaty of Friendship, Co-operation and Mutual Assistance concluded between the two States on March 17, 1967, the Munich Agreement is referred to as a "Diktat", which had been accomplished by means of pressure and extortion and whose imposition upon the Czechoslovak State constituted a serious violation of international law; therefore this Agreement had to be considered void from the beginning.⁷⁵

Poland, which had also received Czechoslovak territory through the arrangements of 1938, was asked immediately at the end of the war to declare the Munich Agreement void. Poland, however, refused to issue such a declaration, whereupon a Polish-Czechoslovak dispute developed which had to be settled by Stalin himself.

Even in the Treaty of Mutual Friendship and Assistance concluded between Poland and Czechoslovakia the Munich Agreement remained unmentioned and it was not until the Treaty of March 1, 1967 that it was stated:

75. GB1. (DDR) I, 1967 p. 54-56 (55).

...the Munich Agreement came into being... by threat of an offensive war and use of force upon Czechoslovakia. It was part of the criminal conspiracy from the side of the Government of National Socialist Germany against the peace, a brutal breach of principles of international law already in force at that time and therefore invalid from the beginning with all the consequences resulting from these facts.⁷⁶

In the settlement of peaceful relations with Czechoslovakia in 1947, Hungary declared that it considered the Munich Agreement invalid from the beginning. At the same time it was agreed that Hungary should be freed from any negative legal consequences which might arise from the declaration of nullity.⁷⁷

Nearly all Germans who lived in Czechoslovakia were concentrated in camps, deprived of their property and evacuated to Germany.⁷⁸

76. Article 6 of the Treaty; see Möller, Die Verständigung zwischen Bonn und Prag, loc.cit. p. 336.

77. Ibid., p. 334.

78. One will not be able to say unequivocally that the expulsion of Germans from Czechoslovakia had been carried out with the express approval of the Great Powers. Rather, their standpoint on this matter supported the decisions made at Potsdam which indicated that the displacements had been unavoidable under the given circumstances.

With regard to this whole complicated matter, it must not be overlooked that at this time the Czech action against the Sudeten Germans had been underway for quite some time (see also Brügel, Tschechen und Deutsche 1939-1946, pp. 169.

During the debate on June 13, 1946 in the House of Commons, the question directed to the Secretary of State for Foreign Affairs, "whether the expulsion of the Sudeten Deutsch population from Czechoslovakia is a unilateral action on the part of the Czechoslovak Government; and whether it has the endorsement of the major Allied Governments", was answered as follows:

"His Majesty's Government have no detailed information as to the extent to which such expulsion is taking place. They consider that the transfer, to whatever extent may be agreed on, of Germans from Czechoslovakia to Germany should be carried out in an orderly fashion as an integral part of the plans of the controlling Powers for the post-war settlement of Germany. They have made this view known to the other controlling Powers and to the Czechoslovak Government" (Parliamentary Debates, Hansard, Fifth Series, Vol. 411, col. 1632).

The expulsion, which, according to the Potsdam Agreement of August 2, 1945, was to be carried out in terms of a "resettlement of the German inhabitants of Poland, Czechoslovakia and Hungary in Germany in a legal and humane way", nevertheless deteriorated into a haphazard procedure which was preceded by total expropriation, internment in camps and other uncivilized and violent actions. In this way more than three million Germans who had survived the war and its aftermath were expelled from Czechoslovakia.⁷⁹

79. Strupp-Schlochauer, Bd. 3, p. 560; Franzel, Die Vertreibung Sudetenland 1945/46, pp. 21; by the same author, Sudetendeutsche Geschichte, pp. 411; Dahm, Völkerrecht, Bd. 1 p. 411; Beck, Wörterbuch der Zeitgeschichte seit 1945, p. 375. Hilf, Die tschechoslowakische Forderung der Ungültigkeit des Münchner Abkommens ab initio, loc.cit. pp. 847.

For more interesting details concerning this aspect of post-war history I recommend especially the chapter (and the appendix) "Die Sudeten deutschen Vertreibungsexporte 1946" in Bohmann, Das Sudetendeutschtum in Zahlen, p. 249. This interesting book provides the reader with extensive statistical material and offers interesting insights into the Sudeten Germans' fate since the end of the First World War.

7) The Preparation and Conclusion of the Treaty
Concerning the Establishment of Normal Relations
between Prague and the Federal Republic of
Germany⁸⁰

The Government of the Federal Republic of Germany, after having spent much time before giving a precise explanation of her point of view in this question, declared in a note addressed to Czechoslovakia on March 25, 1966:

Die Bundesregierung ist der Auffassung, dass das Münchener Abkommen aus dem Jahre 1938 von Hitler zerrissen wurde und keine territoriale Bedeutung mehr hat. Sie erhebt daher, wie sie mehrfach erklärt hat, gegenüber der Tschechoslowakei keine territorialen Ansprüche.⁸¹

80. Talks concerning an exchange of trade legations had already started in 1964, but had been broken off as early as March 1965. Officially no reasons were given. Unofficially, however, it was said that the Federal Republic had been unable to continue negotiations due to the demand by the CSSR for the unqualified revocation of the Munich Agreement, and its refusal to include West Berlin in the trade agreement. Negotiations were finally resumed in 1967, and on August 3, 1967 an agreement on the mutual exchange of trade legations, governing also the traffic of goods and credit transfers until the year 1969 (with subsequent extensions), was signed in Prague - the first such agreement since the end of the Second World War (B.Ar. 1968 No. 61), p. 1), not taking into consideration the minutes of the meetings of a mixed commission (held from February 4, 1952 to April 29, 1952, and on July 15, 1952) concerning the traffic of goods and credit transfers, and the minutes dated September 24, 1956 concerning credit transfers (B.Ar. 1962 (No. 149) p. 1; 1956 (No. 206) p. 1). Members of the trade legations were given diplomatic status (see v. Münch, Ostverträge III, pp. 163-5).

81. E.t.: The Federal Government holds the opinion that the Munich Agreement of the year 1938 had been breached by Hitler and is now without any territorial relevance. This Government has, therefore, as it had declared several times before, no territorial claims against Czechoslovakia.

This note, of course, did not produce normal relations between the Federal Republic and the CSSR, because such normalization required the prior solution of a great number of problems. But this declaration represented an extensive concession on the part of the Federal Republic with regard to the solution of the Sudeten German question which had been imposed by the Czechs with the support of the Allied Powers ever since May 1945.

However, the intention to come to an understanding was manifested by successive Federal Governments and particularly by the "Great Coalition" in the government declaration of December 13, 1966. In that declaration the Federal Government emphasized its interest in terminating a dark episode in German-Czechoslovak history characterized by Hitler's politics against Czechoslovakia and in establishing conditions of mutual trust between neighbours.⁸²

82. Earlier proposals by Czechoslovakia for the two countries to take up diplomatic relations and sign a non-aggression treaty foundered due to the failure of Adenauer's government to reply to a letter of Prime Minister Siroky of July 14, 1958 dealing with this question. Siroky had already indicated in the Government statement of July 30, 1956 a similar willingness to normalize relations between the two States. (Weigand, Der Vertrag über die gegenseitigen Beziehungen zwischen der Bundesrepublik Deutschland und der Tschechoslowakischen Sozialistischen Republik vom 11. Dezember 1973 - eine völkerrechtliche Analyse, p. 1; Arch. d.G. 5912).

In a later Government declaration of October 28, 1969 the Bonn Government renewed its expression of readiness to reach an agreement with its immediate neighbour, the CSSR, which would serve to lessen the burden of the past. The new Federal Government has confirmed this readiness by the Government declaration of January 18, 1973.

The declaration in September 1970 by the Czechoslovak Prime Minister Strougal, that the signing of the Treaty between the Federal Republic and the CSSR had created a satisfactory atmosphere in Europe and the World and presented an opportunity for regulating relations between the Federal Republic of Germany and the CSSR, led late in March 1971 to exploratory talks between the Federal Republic and the Government of Czechoslovakia.

These exchanges covered six separate meetings up to April 1973, held alternately in the CSSR and the Federal Republic.⁸³ Their purpose was to provide the framework for a German-Czechoslovak treaty. Underlying these exploratory talks was the search for an agreement which

83. These official negotiations were preceded by exploratory talks held on October 13/14, 1970 and March 31/April 1, 1971 (in Prague), on May 13/14 and September 27/28, 1971 (in Bonn), on November 18/19, 1971 (in Rothenburg o.d.T., FRG), on June 29/30, 1972 (in Prague) and finally on April 12/13, 1973 (in Bonn), (Arch.d.G. 15790 B, 16202A, 16261 B, 16571 B, 16696 C, 17190 C and 17849 A).

would be tolerable for both sides in view of the questions which resulted from the problem of the Munich Agreement of September 29, 1938 - of central importance in the view of Czechoslovakia.

Although the talks met with difficulties, they were finally brought to a positive conclusion.

The actual treaty negotiations took place in two sessions in Prague and Bonn in May 1973.

The German-Czechoslovak Treaty on Mutual Relations was initialled provisionally on June 20, 1973 in Bonn by the respective Foreign Ministers and signed subsequently on December 11, 1973 in Prague⁸⁴ by Chancellor Brandt,

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84. Protocol of Signature on the signing of the Treaty on Mutual Relations between the Federal Republic of Germany and the Czechoslovak Socialist Republic and on the Exchange of Letters thereto (excerpts):

"The Treaty on Mutual Relations between the Federal Republic of Germany and the Czechoslovak Socialist Republic was signed today in Prague...

At the same time

(1) an Exchange of Letters on the extension of Article II of the Treaty on Mutual Relations between the Federal Republic of Germany and the Czechoslovak Socialist Republic and on the extension of further treaties within the meaning of Article V of the Treaty to Berlin (West);

(2) an Exchange of Letters on the settlement of humanitarian questions...

The Minister of Foreign Affairs of the Czechoslovak Socialist Republic, Mr. Bohuslav Chnoupek, Eng., handed Herr Walter Scheel, Minister for Foreign Affairs of the Federal Republic of Germany, a letter on matters of criminal prosecution on behalf of the Government of the Czechoslovak Socialist Republic.

Done at Prague on 11 December 1973, in duplicate in the German and Czech languages" (Press and Information Office of the FG of Germany, pp. 16-7).

Prime Minister Strougal and the two Foreign Ministers.⁸⁵

On the same day diplomatic relations were established⁸⁶ between the two States.⁸⁷

85. See BT-Drucksache 7/1832 of March 20, 1974, G.d.B. Document No. 1, section 2; Europe Archive, 3/1974, D 57.

86. Document No. 3.

87. The final communiqué of December 11, 1973 on the negotiations in Prague stated:

"Beide Seiten sehen in dem Vertrag zwischen der Bundesrepublik Deutschland und der Tschechoslowakischen Sozialistischen Republik ebenso in den vorangegangenen Verträgen der Bundesrepublik Deutschland mit der UdSSR, der Volksrepublik Polen und der DDR sowie im Viermächte-Abkommen vom 3. September 1971 einen bedeutsamen Beitrag zum Prozess der Entspannung in Europa." (Presse- und Informationsamt d. BRG Nr. 322754 12.73, p. 32).

E.t.: Both sides regard the Treaty between the Federal Republic of Germany and the Czechoslovak Socialist Republic, the treaties previously concluded by the Federal Republic of Germany with the USSR, the Polish People's Republic and the GDR as well as the Quadripartite Agreement of September 3, 1971 as major contributions to the progress of détente in Europe.

Having initialled the Treaty on June 20, 1973 in Bonn, Foreign Minister Scheel declared:

"Von dem, was Geschichte geworden ist, lässt sich nichts rückgängig machen. Was wir jedoch tun können, ist, gereift durch die historische Erfahrung, Grundlagen zu schaffen für ein neues Verhältnis zwischen unseren Staaten und Völkern. Es soll uns zu einer von den alten Belastungen befreiten weit gespannten Zusammenarbeit führen. Diesem Ziel dient der Vertrag."

E.t.: What is possible for us who have learned the lessons of the past, is to lay the foundations for a new relationship between our states and our peoples. This relationship will lead to wide-ranging co-operation freed from the burden of the past. That is the Treaty's purpose (Press and Information Service of the FRG p. 38).

The signing of the treaty and the exchange of ambassadors were delayed until the last moment by the divergent views concerning consular representation of West Berlin by the Federal Republic of Germany.⁸⁸

The Federal Government was seeking equality of treatment not only for the inhabitants, but also for the institutions and courts of West Berlin with those of the Federal Republic. In the end, the question of the exchange of legal assistance for the West Berlin Courts -which became the culminating point- was negotiated with the Soviet Government. However, in October 1973 Foreign Minister Scheel returned to Bonn with nothing more than a joint declaration of intention to settle the issue at a later date. The Soviet Union did not oppose the wish of the German Foreign Minister that the solution should be found in the direct exchange between courts. This loose agreement with the Soviets was not accepted by the Czechs as binding themselves. Prague has in particular refused to include the legal assistance clause in the normalization package.

88. See Part III, item 2d) of this thesis.

The Federal Government was faced with the question of whether to refuse to take up diplomatic relations and leave the normalization treaty unsigned, with the sole intention of enforcing their right to consular representation of Berlin. A satisfactory solution was hinted at from the Czechoslovakian side, without relating it, however, to the normalization of relations with Bonn.⁸⁹ An exchange of notes -which the Federal Government officially announced on December 5, 1973- took place on November 23/27, 1973 prior to the signing of the Normalization Treaty. The announcement read:

Zwischen den Regierungen der Bundesrepublik Deutschland und der Tschechoslowakischen Sozialistischen Republik hat folgender Notenwechsel stattgefunden:

Verbalnote vom 23. November 1973: "Die Handelsvertretung der Bundesrepublik Deutschland in der Tschechoslowakischen Sozialistischen Republik beehrt sich, dem Ministerium für Auswärtige Angelegenheiten der Tschechoslowakischen Sozialistischen Republik unter Bezugnahme auf die Kontakte zwischen beiden Seiten in der Frage der Gewährung von Rechtshilfe folgendes mitzuteilen:

Anlässlich seines Besuches in Moskau vom 31. Oktober bis 3. November 1973 hat der Bundesminister des Auswärtigen der Bundesrepublik Deutschland, Herr Walter Scheel, aufgrund einer Abstimmung mit der Regierung der UdSSR folgende Erklärung abgegeben:

Beide Seiten vereinbarten, anschliessend in einen Meinungsaustausch zu Fragen der Gewährung von Rechtshilfe einzutreten. Was die Gewährung von Rechtshilfe für Westberliner Gerichte betrifft, so beabsichtigen sie, diese Frage in einer für die interessierten Seiten annehmbaren Form entsprechend dem Viermächte-Abkommen vom 3. September 1971 zu regeln. Soweit gegenwärtig entsprechende Verfahren gelten, bleiben sie bis zur Erzielung einer solchen Regelung unberührt.

89. NZZ, of December 5, 1973.

Dazu kann ich folgendes feststellen: Auf der Basis dieser Abrede sollen verschiedene Formen des Rechtshilfeverkehrs erwogen werden, einschliesslich der Möglichkeit des direkten Verkehrs zwischen Gerichten der Sowjetunion und Gerichten der Bundesrepublik Deutschland und Gerichten der Sowjetunion und Westberliner Gerichten.

Das Ministerium für Auswärtige Angelegenheiten der Tschechoslowakischen Sozialistischen Republik wird um Mitteilung gebeten, ob die tschechoslowakische Regierung bereit ist, auf entsprechender Grundlage zusammen mit der Regierung der Bundesrepublik Deutschland anschliessend an die ins Auge gefasste Aufnahme diplomatischer Beziehungen eine Regelung der Frage der Gewährung von Rechtshilfe einzuleiten. ..."

Czechoslovakia's Note in reply of November 27, 1973

reads as follows:

(Formal introduction).

Die Regierung der Tschechoslowakischen Sozialistischen Republik ist bereit, die Frage der Gewährung von Rechtshilfe nach der Unterzeichnung des Vertrages über die gegenseitigen Beziehungen und der Aufnahme diplomatischer Beziehungen zwischen der Tschechoslowakischen Sozialistischen Republik und der Bundesrepublik Deutschland in vollem Einklang mit der in dieser Frage in Moskau in den Tagen vom 31. Oktober bis 3. November 1973 erreichten Vereinbarung zu regeln. (Complimentary Clause).90

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90. E.t.: The following exchange of Notes has taken place between the Government of the Federal Republic of Germany and the Government of the Czechoslovak Socialist Republic.

Note Verbale of November 23, 1973: The Trade Mission of the Federal Republic of Germany in the Czechoslovak Socialist Republic presents its compliments to the Ministry for Foreign Affairs of the Czechoslovak Socialist Republic and, with reference to the contacts between the two sides regarding the question of granting judicial assistance, has the honour to communicate the following:

On the occasion of his visit to Moscow from October 31 to November 3, 1973, the Minister for Foreign Affairs of the Federal Republic of Germany, Herr Walter Scheel, made the following statement on the basis of an understanding with the Government of the USSR:

The two sides to enter subsequently into an exchange of views on questions regarding the granting of judicial assistance. With regard to the granting of judicial assistance for West Berlin courts, they intend to regulate this question in a form acceptable to the interested parties in accordance with the Quadripartite Agreement of September 3, 1971. In so far as appropriate procedures currently apply, they shall remain unaffected until such regulation has been brought about.

In this regard, I can state the following: On the basis of this understanding, different forms of judicial assistance are to be considered, including the possibility of direct contacts between courts of the Soviet Union and courts of the Federal Republic of Germany, and courts of the Soviet Union and West Berlin courts.

The Ministry for Foreign Affairs of the Czechoslovak Socialist Republic is requested to communicate whether the Czechoslovak Government is willing on a corresponding basis to proceed together with the Government of the Federal Republic of Germany, subsequent to the proposed establishment of diplomatic relations, towards a regulation of the question of granting judicial assistance. ...

Note in reply of November 27, 1973 (Formal introduction)

The Government of the Czechoslovak Socialist Republic is willing to regulate the question of granting judicial assistance fully in conformity with the agreement on this question reached in Moscow between October 31 and November 3, 1973, after the signing of the Treaty on Mutual Relations and the establishment of diplomatic relations between the Czechoslovak Socialist Republic and the Federal Republic of Germany. (Complimentary Clause).

The Treaty came into force on July 19, 1974.⁹¹ To this were added an Exchange of Letters regarding Berlin (West) (Document No. 2), another Exchange of Letters on Humanitarian Questions (Law Gazette II p. 993) and a Unilateral Letter on Criminal Prosecution from the Czechoslovak Minister of Foreign Affairs to his colleague in the Federal Republic, in which the Federal Government was informed that according to Czechoslovak law all criminal acts committed between 1938 and 1945 only capital crimes, i.e., acts which carry the death penalty and at the same time answer the characteristics of war crimes, may still be prosecuted; other crimes are barred by the statute of limitations since 1965 (Law Gazette II p. 997).

91. The first debate on the bill for ratification of the Treaty of December 11, 1973 (see BT-Drucksache 7/1832, loc.cit.) was held on March 20, 1974 following the presentation of the text of the Treaty with the appended letters by the Office of the Federal Chancellor (file number I/4 (II/1)-30130-VE 15/74, BT-Drucksache 7/1832 loc.cit., p. 3).

In the Federal Diet reports on the Treaty were presented by Herr Friedrich (SPD) and Dr. Heck (CDU). Whereas the Minister of Foreign Affairs, Herr Scheel, emphasized that the Treaty should open the door to better relations between both countries, the speaker for foreign affairs of the parliamentary group of the CDU-CSU party, Herr Marx, described the agreement as disappointing and announced the rejection of the bill by the CSU-CSU opposition. (loc.cit. tn. 6006 C, 6034 D=Scheel; tn. 6008 D, 6041 D=Marx). The bill was transmitted the same day to the Committee of Foreign Affairs and the Committee of Legal Affairs. (loc.cit. tn. 6004 D).

Earlier on February 27, 1974 the Committee for Foreign Affairs of the Federal Council, in accordance with Article 76 para 2, sent. 7, of the Constitution, had dealt with the bill and the procedures of ratification (Commentator: Governing Lord Mayor of Berlin, Herr Schütz).

The Federal Council received his report at its session of March 8, 1974 (tn. 59A) and decided not to raise objections to the bill but, in accordance with the motion introduced by the Federal States of Baden-Württemberg, Bavaria, Rheinland-Pfalz, Saarland and Schleswig-Holstein (BR-Drucksache 77/74) to present its official position on the matter within six weeks under Article 76 para 2, sent. 2 of the Constitution (BR-Drucksache 77/74, tn. 65B).

Further debate and discharge of the bill of ratification were on the agenda of the Federal Diet on June 20, 1974. (BT-Drucksache 7/1832 and 7/2270). The bill was adopted over the opposition of the CDU-CSU (BT-Drucksache 7/2270).

On the following day, June 21, 1974 the CDU/CSU-led Federal States (which enjoy a small majority in the Federal Council) rejected the bill and appealed to the Mediation Committee under Article 77, para 2 of the Constitution (BR-Drucksache 449/74). This committee consists of 22 members, 11 each from the Federal Diet and the Federal Council. The recommendation of the Mediation Committee (BR-Drucksache 490/74 (new) Resolution) reads: "The Statute, adopted by the Federal Diet on June 20, 1974, is confirmed" (13th session of the Committee on June 27, 1974).

On July 1, 1974 the Federal Council at its 409th session by majority vote decided to file an objection against the bill under Article 77 para 3 of the Constitution (BR-Drucksache 490/74 (new) tn. 301A and B, 302C). It is to be noted that for treaties of international law, in the legislative process it is not possible to effect concessions because these treaties may only be adopted or rejected as a whole.

The German Federal Diet thereupon passed the bill on July 10, 1974 with the absolute majority of votes required. The roll-call vote was 262 votes in favour, 167 votes against (BT-Drucksache, Debate and Decision, tn. 7633 B, C and D, 7634-7640).

On July 11, 1974 the First Senate of the Federal Constitutional Court unanimously rejected the petition of a Sudeten German (file number 1 BvQ 5/74) to suspend temporarily the signing of the ratification instruments by the Federal President, otherwise if the instruments have already been signed to suspend temporarily the exchange of the instruments of ratification regarding the treaty (Art. 32 LFCC).

The Federal President executed the law of ratification on July 12, 1974 with counter-signatures of the Federal Chancellor and the Federal Minister for Foreign Affairs.

The law was published in the Law Gazette on July 16, 1974 (Part II p. 989). The instruments of ratification were exchanged in Bonn on July 19, 1974 (see Article VI of the Treaty). The notification of the coming into force of the treaty carries the date August 1, 1974 (Law Gazette II, p. 1127).

At that time five constitutional complaints were received by the Constitutional Court, thus not only applications for summary proceedings as in the above-mentioned case file number 1 BvQ 5/74. They were registered under file nos. 1 BvR 210/74, 1 BvR 221/74, 1 BvR 222/74, 1 BvR 248/74 and 1 BvR 301/74. The complaints filed were identical. The wording of the applications was as follows: The law of July 12, 1974 concerning the Treaty of December 11, 1973 on Mutual Relations between the Federal Republic of Germany and the Czechoslovak Socialist Republic (Law Gazette II, p. 989) is unconstitutional.

The constitutional complaints were unsuccessful (see Part III, f.n.1, paragraph 11 at p. 276 and the addendum at pp. 462-74).

To appreciate the significance of the Treaty⁹² and to understand its ramifications it is necessary to discuss the problems particular to German-Czechoslovak relations and to demonstrate how the Treaty settles them.⁹³

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92. The last one of the so-called Ostverträge (East Treaties) after the Treaty between the USSR and the Federal Republic of Germany of August 12, 1970 and the Treaty between the Polish People's Republic and the Federal Republic of Germany of December 7, 1970, concerning the bases of normalization of their mutual relations.

Sulek, The Normalization agreements of 1970-1972 writes (loc.cit. p. 219):

A quarter of a century after the end of World War II Europe entered a new stage of development. For the first time since 1945 our continent was given a real chance to shape a new type of international relations. The overwhelming majority of European States and nations realized the need to bring the era of cold-war confrontation to an end and replace it by an era of all-European cooperation based on perceptible détente, mutual trust and all-round cooperation between all the countries of Europe."

93. Documents No. 15 and 16 in the Annex outline the early course of relations between the GDR and the CSSR in the post-war period. The final settlement of the relations between the two States came with the Treaty on Friendship, Collaboration and Mutual Assistance of March 16, 1969. It was, however, little more than a formality because of the normalization of relations which had by then existed in practice over a lengthy period of time (GB1 (DDR) I 1967, p. 54). The common declaration of October 17, 1974 (ND, October 19, 1974) states the progress of further inter-governmental cooperation.

Part II

Difficulties in Mutual Relations Between the Federal Republic of Germany and the Czechoslovak Socialist Republic and their Settlement in the Treaty of December 11, 1973

1) The Question of Nullity of the Munich Agreement of 1938 (ex tunc)

a) Introductory Remarks Concerning the Legal Problems

In all developed legal systems, "nullity" represents a well-known result of legal defects which can affect legal transactions and acts of sovereignty.

Frowein writes:

Es handelt sich ... um einen Rechtsbegriff, dessen Voraussetzungen und Folgen sich nicht von selbst verstehen, sondern der Rechtsordnung zu entnehmen sind. Die Nichtigkeit ist abzugrenzen von der Nichtexistenz, deren Wesen darin besteht, dass nicht einmal der Schein eines Rechtsgeschäftes oder Hoheitsaktes erzeugt worden ist. Bei der Nichtigkeit liegen dagegen gewisse Voraussetzungen des Aktes vor. Gleichbedeutend werden häufig "Unwirksamkeit" oder "Ungültigkeit" gebraucht, die freilich nicht dieselbe Schärfe aufweisen. Dasselbe gilt im Englischen von "invalidity" und im Französischen von "invalidité". Auch hier kommt wohl die stärkere juristische Präzision den der Nichtigkeit entsprechenden Termini "nullity" - "nullité" zu.¹

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1. Frowein, Zum Begriff und zu den Folgen der Nichtigkeit von Verträgen im Völkerrecht, loc.cit. p. 107.
E.t.: This is ... a legal term whose prerequisites and effects are not obvious but have to be deduced from the general body of law. Nullity must be distinguished from non-existence, the essence of which lies in the

fact that not even the appearance of a legal transaction or an act of sovereignty has been created. For nullity to arise, the act must have been subject to certain prerequisites. "Inoperatibility" and "invalidity" are often used as synonyms, but do not have precisely the same sense. The same can be said about the English term "invalidity" and the French term "invalidité". Here, too, the terms "nullity" and "nullité" approach the greater legal precision of the German term "Nichtigkeit".

For the French law (compared with public international law) see Cavaré, Le Droit International Public Positif, Tome II, pp. 130-1.

French administrative law makes a distinction between "actes absolument inexistants" (instruments absolutely inexistant) and "actes quasi inexistants" (instruments quasi inexistants); the German (Jellinek, Verwaltungsrecht, pp. 252-69) between "Unwirksamkeit" (ineffectiveness, inoperativeness) and "Anfechtbarkeit" (voidability, relative nullity).

When the Federal Government and Czechoslovakia started negotiations for normalizing their mutual relations, both Parties agreed that the Munich Agreement was invalid, but disagreement existed as to when the Treaty became invalid: the Czechoslovak opinion maintained that a valid Treaty had never been concluded because what had taken place in Munich was null and void ex tunc or ab initio, i.e. from the beginning; whereas the German interpretation was that the Agreement has originally been valid and only later became invalid because of subsequent events, namely the elimination of Czechoslovakia in March 1939, i.e., nullity ex nunc or subsequently appearing nullity.

Authors here in the West and in Eastern Europe have referred to nearly the entire array of sources of defects, which can affect an international legal transaction, as possible grounds for ab initio (ex tunc) nullity in a wider sense of the Munich Agreement or for nullity which set in at a later date (ex nunc): non-compliance with formal procedural rules when concluding the agreement; breach of Czechoslovak constitutional law; lack of intent on Czechoslovakia's part due to the threat of military aggression; fraudulent inducement to conclude the agreement; violation of the basic principles of international law; contravention of existing agreements; non-fulfillment of German contractual duties of performance (promise of

guarantee); and violation of the ban on the use of force as a result of the Protectorate Agreement of March 15, 1939.

In his first important analysis on this subject with the title: The Munich Agreement in the light of international law, published in 1959, Zourek writes:

If one wants to see the Munich Agreement under the proper perspective of international law, one must remember that all the signatories of this agreement were bound, just like Czechoslovakia, by the Pact of Paris (Briand-Kellogg-Pact) of August 27, 1928....Moreover, at the time the Munich Agreement was signed, Czechoslovakia, as a member of the League of Nations, was bound, just like France, Great Britain and Italy, to the League of Nations Covenant whose Article 10 imposed on all member-States the duty to safeguard and defend the territorial integrity and political independence of all member-States of the League of Nations against any attack from outside. ...

There was an arbitration agreement in force between Germany and Czechoslovakia which had been concluded in Locarno on October 16, 1925; according to this arbitration agreement both parties were under the obligation to settle all disputes in a peaceful way. ...In addition to the Pact of Paris and the League of Nations Covenant France was tied to Czechoslovakia also through other pacts of alliance.... As far as Nazi Germany was concerned, absolutely convincing proof that the acts of aggression against Czechoslovakia constituted part of a large-scale conspiracy of the Nazi Party against peace was presented already at the International Military Tribunal in Nuremberg at the trial of the main war criminals of the European Axis Powers. ...In order to trigger off the aggression against Czechoslovakia, the Nazi Government made use of the German minority living in Czechoslovakia, that is to say, by using the Sudeten German Party as agent. ...

In the system of international law, fundamental principles are of particular importance; among these, the principle of the sovereignty of States occupies the first place. The logical consequence is found in the principles of equality and independence of States, and the ban against interference in the internal affairs of foreign States. ...

The Munich Agreement represents a gross violation of the sovereignty of the Czechoslovak Republic, since it was concluded without consulting the Czechoslovak State... As the Munich Agreement was concerned with the encroachment on the territorial integrity of Czechoslovakia, it was void from the very beginning.

It was known in learned circles long before World War Two that the threat of armed intervention for the purpose of resolving an international dispute or a conflict constituted a violation of the Pact of Paris of 1928. ...

Ergo: the acceptance of the British-French proposals by the Czechoslovak Government on September 21, 1938 and the acceptance of the Munich Agreement on September 30 represent imposed, and from the very beginning void and legally not binding acts. Consequently, all international agreements which accompany or supplement this agreement are void, especially the Minutes of November 2, 1938 concerning the arbitration decision in the matter Czechoslovakia and Horthy's Hungary.

Furthermore, the Munich Agreement was concluded in violation of the Constitution of the Republic of Czechoslovakia.

The deception perpetrated by the Nazi Government makes the Munich Agreement void. It was proved in front of the International Military Tribunal and in other published documents that Hitler did not conclude the Munich Agreement in order to bring to a final solution the dispute which the Nazi Government had artificially created with the help of the German minority living in Czechoslovakia, but for the sole purpose of creating better conditions to further the criminal conspiracy against peace. ...

However, in order to enable one to properly and fully assess the Munich Agreement it is not sufficient to judge it only in the light of international law as it stood in 1928. It should be looked at, rather, in the light of the international law which emerged when war stopped being a legal means of resolving international disputes. ...²

Each of the above-mentioned arguments would suffice as a ground for the ab initio nullity of the Munich Agreement. All together, though, they form a ground which is unassailable by academic arguments.

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2. This is for Zourek the whole development in the field of public international law since 1945.

In contrast, the argument that Hitler had trampled on the Munich Agreement by invading Czechoslovakia on March 15, 1939 must be rejected.³

Endorsing by and large the preceding point of view, Zourek, in a later study (1968), comes to the following conclusion with regard to the nullity problem:

As ascertained by the Nuremberg Tribunal at the war crimes trials, Hitler had already in 1937 drawn up a plan for the destruction of Czechoslovakia through military aggression, the so-called "Green" plan. The Munich Agreement had been part of this plan of aggression.

Il est donc clair que cet accord ne fut rien d'autre qu'une étape de la conspiration des nazis contre la paix et ne saurait être considéré comme un traité international.⁴

As a further reason to treat the Munich Agreement as "not existent", Zourek adds the following in his essay in the newspaper "Le Monde":

...la conclusion de l'accord de Munich fut de la part de Hitler un acte dolosif, puisqu'il ne l'a conclu que pour s'assurer des conditions favorables en vue de la seconde étape de son agression contre la Tchécoslovaquie. ... Le tribunal de Nuremberg est donc parvenu à la conclusion que Hitler n'avait jamais eu l'intention

3. Translation from the German text, published by Obermann-Polisensky, Die Hintergründe des Münchner Abkommens, pp. 131.

4. E.t.: It is, therefore, clear that this agreement represented only another step in the conspiracy of the Nazis against peace, and should not be considered an international treaty. See. f.n. 6.

de respecter l'engagement pris à Munich. Celui-ci doit donc être considéré du point de vue même du droit des traités comme un acte purement dolosif excluant la naissance d'un engagement juridique.⁵

It is also argued, that the Munich Agreement infringed the principles of sovereignty and equality of States, principles which represent the peremptory norms of general international law (jus cogens). The Agreement had violated the political independence of the Czechoslovak State by surrendering to Germany - with the aid of the international commissions which the Agreement had set up - strongholds situated in areas with a purely Czech population as well as a large section of industry, and by cutting off the main routes of communication.

A further reason which prevented a valid legal act from arising is Hitler's order to Henlein, leader of the Sudeten German Party, to instigate the German population of the frontier territory to revolt against the Czechoslovak State.

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5. Le Monde, April 11, 1968, Annulation ou Inexistence? (Original text: French). E.t.: ...The signing of the Munich Agreement was a fraudulent act on the part of Hitler, since he only concluded it to ensure himself a vantage point in view of the second stage of his aggression against Czechoslovakia. ...The Nuremberg Tribunal, therefore, arrived at the conclusion that Hitler never intended to respect the obligations assumed at Munich. This then must be considered, even from the point of view of the Law of Treaties, a purely fraudulent act which precluded any legal obligation.

In addition, three of the four parties at the Munich conference were under an obligation to protect Czechoslovakia's territorial integrity and political independence from any outside aggression, in accordance with Article 10 of the League of Nations Covenant. Members of the League of Nations were bound by Article 20 of the Covenant not to conclude any agreements which were incompatible with the Covenant.

An agreement clearly violating the provisions of Article 10 of the Statute was to be inadmissible.

The final reason for the ab initio nullity is to be found in the Czechoslovak Constitution operating at that time, which specified that any changes to the national territory required statutory authority. Such a law was never passed.

Michal writes:

The Munich Agreement trends from the legal premise that the exchange of the Anglo-French notes of September 19 and the Czechoslovak note of September 21 gave rise to a valid international agreement. The Munich Agreement thus contains just the technical details for the implementation of that agreement. The content of the Czechoslovak declaration, however, is legally ineffective not only from the point of view of domestic law but also from that of international law.

Article 64 paragraph 1 of the Czechoslovak Constitution of 1920 lays down that any change in the territory of the Czechoslovak State is effective only when it has been approved by the National Assembly. From a legal point of view, this approval cannot be replaced by any Government statement. The content of the note of the Czechoslovak Government shows that the Government's consent depended on two conditions:

a) the Czechoslovak Government accepts these proposals in their entirety from which the principle of guarantee - as formulated in the note - cannot be separated...

b) the Czechoslovak Government interprets the French-British proposals as meaning that all the details concerning their practical implementation must be agreed upon with the Czechoslovak Government.

Neither of these conditions was fulfilled.

A further reason why the Munich Agreement is void ab initio is because its acceptance was imposed on Czechoslovakia through the threat of force in breach of international law. Nazi Germany, thus, not only violated the League of Nations Covenant but also the Briand-Kellogg-Pact which had been ratified by Germany...⁶

Ort holds the following view:

Plenty of legal arguments were advanced, showing that from the point of view of international law the Munich diktat was void ab initio. Czechoslovakia - which was the subject matter at Munich - was not itself a signatory of the Agreement, thereby violating the fundamental principles of international law which speak of the sovereignty of States and the non-interference in the internal affairs of individual States... In addition, the Munich Agreement stood in clear opposition to the principles of the Covenant of the League of Nations whose members had undertaken in Article 10 to preserve and protect the territorial integrity and the existing political independence of all members of the League of Nations against any outside aggression. Moreover, there is not a shadow of doubt that the Munich Agreement was imposed on Czechoslovakia through the threat of force. ...

The Munich diktat is considered by the Czechoslovak side as a violation of the Constitution.

6. Michal, Das Münchener Abkommen in der zeitgenössischen westdeutschen bourgoisen Literatur, pp. 49, (translation from a Czech-German translation).

According to the Czechoslovak Constitution, agreements effecting any territorial change of the State could be concluded by the President only with the approval of the National Assembly. This was not done on September 7, 1938. ...⁷

The standpoint favoured by West German scholars was summarised by Kimminich as follows:

Die Frage nach dem gültigen Zustandekommen oder Nichtzustandekommen eines völkerrechtlichen Vertrages richtet sich nach den Willenserklärungen und Rechtshandlungen beim Abschluss des Vertrages, die nach dem in jenem Zeitpunkt geltenden Völkerrecht zu beurteilen sind.

Bei der Beurteilung des Münchner Abkommens ist zunächst zu berücksichtigen, dass es von vornherein keine Einigung über die Gebietsabtretung herbeigeführt hat oder herbeiführen wollte, sondern vielmehr von der "Übereinkunft, die hinsichtlich der Abtretung des sudetendeutschen Gebietes bereits grundsätzlich erzielt wurde" (Art. 1 Abs. 1 des Abkommens...) ausging und nur die "Bedingungen und Modalitäten dieser Abtretung" festlegen wollte.

Die "grundsätzlich erzielte" Übereinkunft, auf die das Münchner Abkommen in seinem ersten Absatz Bezug nimmt, war durch den Notenwechsel zwischen England und Frankreich einerseits, der tschechoslowakischen Republik andererseits, in der Zeit vom 19. bis 21. September zustandekommen. ...

Die Konstruktion einer vertraglichen Übereinkunft über die Gebietsabtretung zwischen der tschechoslowakischen Republik und den beiden Westmächten durch den Notenwechsel vom 19./21. September 1938 reicht jedoch nicht aus, um eine rechtsgültige Zession zu begründen. Denn an dieser Übereinkunft war der Zessionar, d.h. das Deutsche Reich, nicht beteiligt. Dass das Deutsche Reich seine Zustimmung erklären würde, stand freilich ausser Zweifel, und im Münchner Abkommen ist eine solche Erklärung zu sehen. ...

7. Ort, Über die Ungültigkeit des Münchner Diktats, loc.cit. pp. 67, (translation from a Czech-German translation).

Da die Tschechoslowakei am Münchner Abkommen nicht beteiligt war, konnte eine Rechtsbindung nur durch den Beitritt dieses Staates zum Münchner Abkommen bewirkt werden. Ein solcher Beitritt erfolgte durch die Erklärung der Tschechoslowakei vom 30. September 1938, die jedoch zugleich einen Protest gegen die Münchner Regelung enthielt. Die Frage, ob der verbale Protest die rechtliche Wirkung der Annahmeerklärung annullieren konnte, ist von der Literatur verneint worden. Zur Begründung wird angeführt, dass es zu einer totalen Rechtsunsicherheit führen würde, wenn der verbale Protest die Wirkung einer völkerrechtlichen Willenserklärung beseitigen könnte. Die Wirkung der tschechoslowakischen Annahmeerklärung vom 30. September 1938 bestand gerade darin, dass die CSR an der Durchführung des Münchner Abkommens, d.h. an der Festlegung der Grenze und der Modalitäten der Abtretung beteiligt wurde. ...

Bei den Argumenten, mit denen die rückwirkende Beseitigung der rechtsgültig zustande gekommenen Münchner Regelung begründet wird, steht der Bruch des Abkommens an erster Stelle. Es wird darin gesehen, dass das Deutsche Reich unter Verstoss gegen das im Münchner Abkommen enthaltene Garantieverprechen den grösseren Teil der Resttschechoslowakei im März 1939 militärisch besetzte.⁸

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8. Kimminich-Rumpf, *loc. cit.* p. 177-80. E.t.: The question of whether a treaty based on international law was validly created or not depends on the declarations of intent and legal acts performed at the conclusion of the treaty; these must be judged in accordance with international law in force at that time. In analysing the Munich Agreement one must consider first of all that it did not lead nor was it intended to lead to an agreement regarding the ceding of territory, but that it relied rather on the "agreement which had already been basically reached concerning the cession of the Sudeten German territory" (Article 1, paragraph 1 of the Agreement ...), and whose purpose was solely to lay down the "conditions and modality of such a cession".

The agreement which was "basically reached" and reference to which is made in the first paragraph of the Munich Agreement, had been formed between September 19, and 21, through the exchange of notes between England and France on the one hand and the Czechoslovak Republic on the other hand. ...

However, it is not sufficient to construe a contractual settlement concerning the territorial cession made between Czechoslovakia and the two Western Powers through the exchange of notes of September 19/21, 1938 as a legally valid cession, since the transferee, i.e., the German Reich, was not a party to the agreement. It was beyond doubt that the German Reich would consent to it, and the Munich Agreement must be seen as exactly such a consent. ...

As Czechoslovakia was not a party to the Munich Agreement, a legal connection could only be achieved if this country had been a party to the Munich Agreement. This, in fact, happened when Czechoslovakia made its declaration of September 30, 1938 which, at the same time, contained a protest against the Munich Agreement. The question of whether the verbal protest could annul the legal effect of the declaration of acceptance has been answered in the negative by authoritative literature, the arguments advanced being that it would lead to complete legal insecurity if the verbal protest could set aside the effect of a declaration of intent of international law. The effect of the Czechoslovak declaration of acceptance of September 30, 1938 must be seen in the very fact that the CSR participated in the performance of the Munich Agreement, i.e., by determining the frontiers and the modality of the cession. ...

The violation of the Munich Agreement is the first and foremost reason given when arguing in favour of a retrospective annulment of the Munich settlement which had been concluded in a legally valid manner. The violation is seen in Germany's military occupation of the greater part of the rest of Czechoslovakia in March 1939 in breach of the guarantee undertaking contained in the Munich Agreement.

Kimminich does not go as far as examining and deciding the issue of whether Czechoslovakia's Declaration of September 30, 1938 was legally defective due to the violation of provisions pertaining to Constitutional law, in the form of a lack of consent by the Czechoslovak Parliament, or whether it was because political or military pressure was exercised on Czechoslovakia before it made its declaration of intent, and was, therefore, legally questionable. He shifts the question instead to the Czechoslovak Declaration of September 21, 1938 concerning the acceptance of the French-British proposals, and states:

...(Es ist) ... die völkerrechtliche Erheblichkeit der Nichtbeachtung von Verfassungsvorschriften eines Vertragspartners zu untersuchen. Nach der heute herrschenden "Erklärungstheorie" ist auf die Erklärung des Vertragspartners abzustellen. Hier kommt noch hinzu, dass eine allgemeine Zuständigkeitsvermutung für das Staatsoberhaupt spricht. Die genaue Kenntnis des Verfassungsrechts des Vertragspartners ist von den Unterhändlern nicht zu verlangen. Ausnahmen gelten nur bei evidenten Verstößen gegen die Verfassung.

...Die von den Westmächten vorgeschlagene Lösung sollte (die) Kriegsfurcht bannen. Es ist zu fragen, ob Verträge, die aus einer solchen allgemeinen Kriegsfurcht entstanden sind, um die Kriegsgefahr zu beseitigen, später als von Anfang an nichtig angesehen werden können. Im Jahr 1938 neigte die Völkerrechtswissenschaft offenbar nicht zu dieser Auffassung. ...⁹

9. Ibid., p. 178-9. E.t.: ...(One must)...examine the relevance in international law of a contractual party's non-compliance with constitutional rules.

In accordance with the "statement theory", one must focus on the statement of the contractual party. One must also add to this a general implied authority on the part of the Head of State. A precise knowledge of a contractual party's Constitutional law cannot be demanded of the negotiators. Exceptions can be admitted only in the case of obvious violations of the Constitution.

...The solution arrived at by the Western Powers was meant to banish the fear of war. The question now is, whether agreements which were concluded as a result of fear of war in order to remove the threat of a war can be considered void ab initio. In 1938, international law circles apparently did not favour this view. ...

Rumpf states:

Das eigentliche Münchner Abkommen, d.h., der Vertrag zwischen dem Deutschen Reich, Grossbritannien, Frankreich und Italien vom 29. und 30. September 1938, setzt ... das Abkommen, "das hinsichtlich der Abtretung des sudetendeutschen Gebiets bereits grundsätzlich erzielt wurde", voraus und regelt nur noch die "Bedingungen und Modalitäten dieser Abtretung" und ... "die danach zu ergreifenden Massnahmen"... Das Grundabkommen bestand in einem Notenwechsel zwischen den Regierungen Grossbritanniens, Frankreichs und der Tschechoslowakei. Im Anschluss an das Viermächteübereinkommen vom 29. - 30. September, zu dem die tschechoslowakische Regierung am 30. September ihr Einverständnis erklärt hatte, wurde dann zwischen dem Deutschen Reich und der tschechoslowakischen Republik am 20. November 1938 noch ein Ausführungsabkommen über Staatsangehörigkeits- und Optionsfragen geschlossen. Löst man in dieser Weise das mit der Überschrift "Münchner Abkommen" versehene Paket auf, so findet man also:

1. Einen Grundvertrag zwischen den beiden Westmächten und der Tschechoslowakei über die Zession des Sudetengebietes an das Deutsche Reich.
2. Den Viermächtevertrag zwischen dem Deutschen Reich, Grossbritannien, Frankreich und Italien über die Bedingungen und Modalitäten dieser Abtretung.
3. Einen deutsch-tschechoslowakischen Vertrag über einzelne Fragen der Durchführung.

Eine Erklärung darüber abzugeben, ob das Grundabkommen rechtsgültig zustande gekommen ist oder aber von Anfang an nichtig war, steht der Bundesrepublik Deutschland nicht zu, da es sich um eine res-inter-alios-acta handelt. Der Umstand, dass dieses Abkommen eine Gebietsübertragung an das Deutsche Reich zum Inhalt hatte, berechtigt die Bundesrepublik nicht, heute in einem Vertrag mit der tschechoslowakischen Republik zu erklären, das derzeitige Abkommen der drei anderen Mächte sei nicht gültig zustande gekommen.¹⁰

10. Ibid., p. 186. E.t.: The actual Munich Agreement, i.e., the agreement made between Germany, Great Britain, France and Italy on September 29 and 30, 1938, has as pre-requisite ... the agreement "which had been basically reached with regard to the cession

of Sudeten German territory", and lays down only the conditions and modality of such cession as well as "the measures to be taken thereafter". ...The basic agreement consisted in an exchange of notes between the British, French and Czechoslovak Governments. The Four-Power agreement of September 29/30, which was approved by the Czechoslovak Government on September 30, was followed by an implementation agreement concerning questions of nationality and options concluded between Germany and the Czechoslovak Republic on November 20, 1938. If one opens in this way the package marked "Munich Agreement" one finds:

1. A basic agreement concerning the cession of the Sudeten territory to Germany and made between the two Western Powers and Czechoslovakia.
2. The Four-Power Agreement made between Germany, Great Britain, France and Italy, dealing with the conditions and modality of such a cession.
3. A German-Czechoslovak Agreement dealing with individual questions of implementation.

It is not up to the Federal Republic of Germany to make a statement on whether the basic agreement concluded was legally valid or whether it was void ab initio, since it is a case of res inter alios acta. The fact that this agreement concerned the transfer of territory to Germany does not give the Federal Republic the right now to declare in an agreement with Czechoslovakia that the agreement concluded at that time by the other three Powers had not been validly made.

Rumpf, thus, does not take up any definite position with regard to the nullity problem.

Akehurst's view must not be taken seriously at all costs; relying on Article 70, paragraph 1 of the Vienna Convention on the Law of Treaties he states:

German title to the Sudetenland had been created as a result of the execution of the Munich agreement prior to its termination, and therefore termination of the Munich agreement (whether as a result of its breach or for any other reason) would not cause the Sudetenland to revert to Czechoslovakia.¹¹

Kimminich appropriately observes:

Damit geht Akehurst in seinen Schlussfolgerungen über das hinaus, was von der überwiegenden Mehrheit des deutschen Schrifttums aus dem rechtsgültigen Zustandekommen des Münchener Abkommens abgeleitet wird. Es soll nicht verschwiegen werden, dass auch im deutschen Schrifttum die Behauptung aufgestellt worden ist, das Sudetenland unterstehe völkerrechtlich nach wie vor, bis zu einem gesamtdeutschen Friedensvertrag, dem Deutschen Reich und sei bis zur endgültigen Gebiets- und Grenzregelung die "tschechoslowakische Besatzungszone Deutschlands." Aber diese Ausführungen ... haben in der deutschen völkerrechtlichen Literatur keinen Anklang gefunden.¹²

11. Akehurst, Burying the Munich Agreement, loc.cit. p. 474.

12. Kimminich, Der Prager Vertrag, loc.cit. p. 81. E.t.: In his conclusions, Akehurst goes beyond what German literature deduces from the legally valid formation of the Munich Agreement. One must also not omit to mention that in German literature, too, it has been contended that from the point of view of international law the Sudetenland still belonged to the German Reich until an overall German peace treaty was made, and that until a final territorial and frontier settlement was arrived at, it remained "Germany's Czechoslovak occupation zone." However, these statements ... have not found an echo in German literature on international law.

The formulae which the Federal Republic of Germany has used in commenting the Munich Agreement have changed as time has gone by.

At the conference of Foreign Ministers in Geneva in 1959 the delegate from Bonn stated that the Federal Government noted that the Munich Agreement was the subject of controversy, and that the Federal Government had no claims against Czechoslovakia.¹³

On June 11, 1964 Federal Chancellor Erhard stated before the Council on Foreign Relations in New York to the effect that

Hitler broke the Munich Agreement by marching into Czechoslovakia. The Federal Republic has no territorial claims against Czechoslovakia, and disassociates itself emphatically from statements which would have led to another interpretation.¹⁴

The Statement made by the Federal Government in the Note of March 25, 1966¹⁵ was repeated in the Government Statement made by the Federal Chancellor on the same day.¹⁶

13. Raschhofer, Die Sudetenfrage, Staatslexikon, loc.cit. col. 872.

14. Bulletin vom 12.6.1964, Nr. 93, p. 852.

15. See Part I, p. 62, E.t.: f.n. 81.

16. Bulletin vom 26.3.1966, Nr. 42, pp. 329-30.

In the Government Declaration made by Federal Chancellor Kiesinger on December 13, 1966 one can read:

Auch mit der Tschechoslowakei möchte sich das Deutsche Volk verständigen. Die Bundesregierung verurteilt die Politik Hitlers, die auf die Zerstörung des tschechoslowakischen Staatsverbandes gerichtet war. Sie stimmt der Auffassung zu, dass das unter Androhung von Gewalt zustande gekommene Münchener Abkommen nicht mehr gültig ist.¹⁷

The so-called Bahr Paper of December 12, 1970 contains the following passage:

Zwischen der Regierung der Bundesrepublik und der Regierung der Union der Sozialistischen Sowjetrepubliken besteht Einvernehmen darüber, dass die mit der Ungültigkeit des Münchner Abkommens verbundenen Fragen ... geregelt werden sollen.¹⁸

Thus, also this official statement of the Federal Government, like all previous statements, is based on the premise that the Munich Agreement is void. However, the Federal Government did not give in to the demand originally made by Czechoslovakia and brought by the latter into the negotiations concerning the normalization treaty, that the Agreement should be considered void ex nunc.

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17. Bulletin vom 14.12.1966, Nr. 157, p. 1268. E.t.: The German people would like to come to an understanding also with Czechoslovakia. The Federal Government condemns Hitler's policy which was directed at the destruction of the Czechoslovak State federation. It agrees also with the view that the Munich Agreement which came into being as a result of duress is not valid any longer.
 18. Der Vertrag vom 12.8.1970, loc.cit. p. 18. E.t.: The Government of the Federal Republic of Germany and the Government of the Union of Soviet Socialist Republics agree that all issues connected with the nullity of the Munich Agreement...must be settled.

In the Bill relating to the Treaty of December 11, 1973 brought in by the Federal Government one can read:

Bekanntlich haben die Bundesrepublik Deutschland und die CSSR zu der Frage, ob das Münchener Abkommen zunächst rechtswirksam zustande gekommen oder von vornherein nichtig gewesen sei, seit jeher gegensätzliche Auffassungen vertreten, die auch in den mehr als zweijährigen Sondierungen und Verhandlungen nicht auf einen Nenner gebracht werden konnten. Die Bundesrepublik Deutschland hat zwar niemals bestritten, dass das Münchener Abkommen durch die während des Zweiten Weltkrieges von Grossbritannien, Frankreich und Italien abgegebenen Erklärungen seine ursprüngliche Rechtswirkung verloren hat. Gleichwohl hält sie daran fest, dass das Münchener Abkommen vom 29. September 1938 seinerzeit rechtswirksam zustande gekommen war. Die CSSR hat demgegenüber den Standpunkt vertreten, dass das Münchener Abkommen von Anfang an nichtig gewesen sei.¹⁹

Fitzmaurice, as Special Rapporteur to the International Law Commission, defined in Article 22, paragraph 2 the difference between nullity ex tunc and subsequently appearing nullity in his Third Report to the Commission.

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19. BT-Drucksache 7/1832, G.d.B. v. 20.3.1974, p. 19. E.t.: It is a known fact that the Federal Republic of Germany and Czechoslovakia have divergent views on the question of whether the Munich Agreement was validly made at first or whether it was void from the beginning; these views could not be reconciled even after more than two years of exploratory talks and negotiations. The Federal Republic of Germany, though, had never disputed the fact that the Munich Agreement lost its validity as a result of the declaration made during the Second World War by Great Britain, France and Italy. Although it still maintains that the Munich Agreement of September 29, 1938 came, at that time, validly into being. In contrast, Czechoslovakia holds the view that the Munich Agreement was void ab initio.

(a) ...Where ...the treaty is void ab initio or totally inoperative, the whole transaction is a nullity and void with retroactive effect: any steps taken in consequence of it are automatically nullified, and, in so far as this may arise and may be possible, there must be a complete restitutio in integrum or restoration of the status quo ante, but damages or reparation will not, as such, be recoverable except in cases involving an element of fraud.

(b) Where the treaty is merely voidable, the obligations of the parties cease as from the date of avoidance, but without retroactive effects or the automatic nullification of any steps already taken under or in execution of the treaty.²⁰

The proposal submitted by the International Law Commission to the Vienna Conference on the Law of Treaties states:

The Commission considered that the establishment of the nullity of a treaty ...would mean that the treaty was void ab initio and not merely from the date, when the ground was invoked.²¹

Guggenheim distinguishes the acte inexistant, which legally does not even come into existence.

20. Draft of 1958, UN Doc. A/CN.4/115, YB. I.L.C. 1958, p. 28.

R. Piccard-E. Thilo-E. Steiner, Rechtswörterbuch, write: "ex tunc=dès l'origine, qui se dit d'une annulation dont les effets remontent au début" (E.t.: from the beginning, refers to an annulment the effects of which go back to the commencement); "Ex nunc=dès maintenant, qui se dit d'une annulation qui produit effet pour l'avenir" (E.t.: from the present, refers to an annulment the effects of which reach into the future).

21. UN Doc. A/CONF. 39/11 Add. 2 p. 84.

Si la manifestation extérieure de l'acte ne correspond à aucune réalisation effective et si sa chance de devenir effectif est minime, l'acte n'a besoin d'être annulé. Il est nul ex officio, il est inexistant. La preuve de son inexistence n'incombe pas au sujet de droit qui l'ignore, mais c'est à celui qui affirme son caractère effectif de prouver son existence.²²

He further distinguishes actes nuls, by which is meant:

...des actes juridiques dont un organe compétent de l'ordre international déclare qu'ils ne sont pas en mesure de déployer des effets dans le cadre de ce droit, et auxquels il refuse toute reconnaissance. Contrairement à l'acte inexistant, l'acte nul a donc besoin d'être constaté dans une déclaration constitutive de sa nullité. ...L'acte nul-contrairement à l'acte inexistant-déploie, par conséquent, certains effets provisoires. Il est l'expression de l'effectivité, et il doit être annulé.²³

Guggenheim classifies invalid acts into those of absolute nullity, i.e. acts which are void ab initio and only require a declaration of nullity,²⁴ and those of

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22. Guggenheim, La validité et la nullité des actes juridiques internationaux, end.c. p. 207. E.t.: If the outward appearance of the act does not possess any effectiveness and if the possibility of its being effective is minimal, then there is no need to annul the act. It is null ex officio, it is non-existent. The burden of proof of its non-existence does not rest with the subject of law that does not recognize it; rather it is up to those who maintain its effectiveness to prove its existence.
23. Ibid., pp. 207-8. E.t.: ...legal acts which the competent State organ declares to have no legal effects and which do not enjoy recognition. In contrast to the non-existent act the void act requires a constituent declaration of nullity... . In contrast to the non-existent act, the void act exhibits in consequence of this certain temporary effects. It is the expression of effectiveness and has to be annulled.
24. Ibid., p. 207 and 209.

relative nullity, i.e. acts in which certain effects have already been produced and in which it was not possible to annul such acts immediately. Guggenheim adds:

La doctrine est aussi d'accord de ne pas attribuer des effets rétroactifs à l'annulation. La nullité est ainsi une nullité ex nunc et non ex tunc.²⁵

Finally, Guggenheim distinguishes acts "originaires-ment valables", in which the legal act was concluded in a valid manner but which was later declared invalid because of a violation of its provisions. He explains further:

Dans la pratique diplomatique internationale, cette dénonciation prend souvent l'aspect d'une "annulation". Tel est le cas pour la dénonciation de l'Accord originellement valable de Munich de 1938 par la Tchécoslovaquie et par certains de ses signataires. ...²⁶

Guggenheim sees as a consequence of faults of consent, fraud, coercion and conclusion of a treaty in disregard of constitutional restrictions only voidability and not, however, absolute nullity. He describes after all the Munich settlement as an instance of annulment of originally valid acts and emphasizes that the Agreement was at first considered by all the signatories as absolutely valid.²⁷

25. Ibid., p. 209. E.t.: The doctrine is also unanimous in not allowing the nullity to act retrospectively. The nullity is, therefore, a nullity ex nunc and not ex tunc.

26. Ibid., p. 240. E.t.: In international diplomatic practice this cancellation often has the appearance of a declaration of nullity. This is the case with regard to the cancellation of the originally valid Munich Agreement of 1938 by Czechoslovakia and certain signatory states.

27. Guggenheim, Lehrbuch des Völkerrechts, Bd. I, p. 83-7 (87); by the same author (f.n.22), p. 242.

Dahm emphasises that a treaty is invalid from the very beginning if it contradicts mandatory norms of international law or of international morals and, consequently, also the ordre publique international. However, one ought to use here strict standards. The legal act of international law which originally became void in this way would have to contradict not only in its motive but also in its content mandatory international law or moral law.²⁸

Delbez gives the following reasons to explain the difference between absolute and relative nullity of acts of international law in general, i.e., also of those which form part of an international treaty:

Un acte est nul d'une nullité absolue, quand un élément essentiel à sa formation lui fait défaut. De tels actes sont nuls ab initio et les intéressés peuvent soit les déclarer eux mêmes non valables, soit les faire annuler par un juge, auquel cas l'annulation est souvent rétroactive. D'autre part, ils sont nuls à toujours et leur vice originaire n'est jamais couvert par l'écoulement du temps...; un acte est entaché d'une nullité relative, quand il émane d'un organe incompétent, repose sur une erreur de fait ou présente chez un de ses signataires un vice du consentement. De tels actes ont reçu un commencement d'exécution et l'annulation qui intervient souvent longtemps

28. Dahm, Völkerrecht, Bd. 3, p. 59-60.

après n'a pas d'effet rétroactif. Il s'agit donc d'une nullité ex nunc et non pas ex tunc.²⁹

Just like Guggenheim, also Delbez was of the opinion that originally the Munich Agreement came into being in a valid way, and to support this opinion he cites the fact that in the case of a breach of an originally valid but not properly carried out agreement, the compensation in diplomatic practise was achieved through the annulment (annulation) of the agreement, i.e., through the restoration of the original conditions. This was the case when Czechoslovakia and some of the signatory States revoked the originally valid Munich Agreement of 1938 so that the legal reason for the subsequent repudiation of the Agreement must not be seen in an ab initio nullity.³⁰

29. Delbez, Les Principes Généraux du Droit International Public, droit de la paix, droit préventif de la guerre, droit de la guerre, p. 56-7. E.t.: An act is void, absolutely void, if it lacks an essential element for its formation. Such acts are void ab initio, and the parties can either declare them void or have them annulled by a law-court, in which case the nullity is often a retrospective one. On the other hand, these acts remain permanently void, and time will never be able to make good the original defect. An act is of relative nullity if it emanates from an organ lacking jurisdiction (ultra vires), is based on an error of fact or if one of its signatories displayed a lack of consent. The performance in cases such as these has already begun, and the annulment, which often takes place long afterwards, has no retrospective power. It is, thus, an ex nunc and not an ex tunc nullity.

30. Delbez, Les Principes Généraux du Contentieux International, p. 248.

Cahier writes:

En réalité, il semble que la distinction à faire n'est pas tellement entre nullité absolue ou nullité relative, mais entre le cas où la cause de nullité existait au moment de la conclusion du traité et celui où la cause de nullité intervient au cours de son existence. Dans le premier, la nullité doit avoir, dans la mesure du possible, un effet rétroactif, alors que dans le deuxième cas le traité sera nul à l'avenir.³¹

The cases of ex tunc nullity of international treaties are set out in detail in Part V, section 2 of the Vienna Convention on the Law of Treaties and particularly in Articles 46 ("Internal law regarding competence to conclude treaties"), 48 paragraph 1 ("Error"), 49 ("Fraud"), 50 ("Corruption of a representative of a State"), 51 ("Coercion of a representative of a State"), 52 ("Coercion of a State by the threat or use of force"), 53 ("Treaties conflicting with a peremptory norm of general international law (jus cogens)"), further, in section 3,

31. Cahier, Les caractéristiques de la nullité en droit international et tout particulièrement dans la Convention de Vienne de 1969 sur le droit des traités, end.c. p. 685. E.t.: Actually, it seems that one ought to distinguish not so much between absolute and relative nullity, but between the event which was the cause for the nullity at the time the agreement was signed and the event on which the cause for the nullity focused in the period of its existence. In the first case, the nullity must have acquired within the limits of possibility a retrospective effect, while in the second case the agreement is void for the future.

Article 64 ("Emergence of a new peremptory norm of general international law (jus cogens)"), distinguishing apparently between those void as a matter of course (automatically) ("void", "without legal effect") contained in Article 51 to 53 and 64, and those contained in Article 46 ("may not invoke the fact, ... unless") and in Articles 48 to 50 ("may invoke") which may be contested by the State involved.

The grounds which can make a treaty void ex nunc or which can suspend its execution are to be found in Part V, section 3, Articles 54 to 62 ("termination", "suspension").

A different placement of Article 39, paragraph 1, sent. 2 as Article 69, paragraph 1, sent. 1 of the Convention which the French succeeded in imposing at the Vienna negotiations obviously does not go beyond a legal-dogmatic question of systematics.

According to Verosta, the effect of the French request was to reduce in itself the extent of the automatic nullity of international treaties.³² In draft Article 39, paragraph 1, sent. 2 one can read "A treaty, the invalidity of which is established under the present articles, is void", whereas Article 69,

32. Verosta, Die Vertragsrechts-Konferenz der Vereinten Nationen 1968/69 und die Wiener Konvention über das Recht der Verträge, loc.cit. p. 690.

paragraph 1, sent. 1 of the Convention refers to the "present Convention" and not to "present articles"; this, however, brings with it no decisive changes, since the elements of all the treaties which are either void, terminable or suspendable were taken over unchanged from the draft and embodied into the Convention, namely into the Articles of draft Articles 43, 48, 49 and 50 (46, 51, 52 and 53 of the Convention), except for a few linguistic alterations or additions which are not relevant in this context.

Rozakis writes:

...State practice may be deemed as having developed some indications of the recognised grounds upon which invalidity may be based; but by no means does it provide for a complete system of invalidity rules covering indisputable consequences and procedure of invalidity as is the case with the domestic legal order.

...the Vienna Convention has created a system of rules on invalidity which, although bearing some external similarities to the corresponding systems of municipal orders, is invariably adjusted to the needs and limitations of the international legal order as it presently is, that is, without making any substantive step toward changing it.³³

Up to the time of the Convention on the Law of Treaties, there was no comprehensive State practice in international law with regard to the consequence of contractual defects which under national law bring about the nullity of the contract. The Convention in itself does not yet represent valid international law, since, according to Article 84,

33. Rozakis, The Law on Invalidity of Treaties, loc.cit. p. 151 (f.n. 3).

it only comes into force "on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession". The provisions contained in the Convention, therefore, are valid only if they form part of existing international law even in the absence of the Convention.

The view that the Convention became valid international law merely because of its acceptance within the body of the U.N. must, therefore, be rejected, since Article 84 of the Convention proves that the Convention itself makes no claim to validity in the absence of ratification by a certain minimum number of members. It is undisputed international law that an agreement which stipulates its ratification is not valid prior to such ratification. This principle is interpreted by Article 4 of the Convention on the Law of Treaties as meaning that

...the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.³⁴

Relating to the important Part V of the Convention (invalidity, termination and suspension of the operations of treaties) Sinclair states:

34. UN Doc. A/CONF. 39/11/Add. 2, p. 290.

Part V of the Convention provoked lengthy and serious debates at both sessions of the Vienna conference. The reason is not far to seek. The spelling out in conventional form of a long series of separate and unrelated grounds for the avoidance of treaties is a disturbing phenomenon for the vast majority of international lawyers, who see in the principle pacta sunt servanda the principal safeguard for the security of treaties and other international transactions.³⁵

b) The Lack of Assent of the Czechoslovak Government

1) Not a Negotiating Partner at the Conference

A prerequisite for the legal success of an international treaty is the unanimous will of the parties to be bound by it. This bond takes effect basically - even if not exclusively - between the parties.

Mac Nair writes:

In spite of the variety in its objects, it is obvious that the treaty as a concept of international law has been mainly indebted in the course of its development to the agreement or contract of private law. In the case of a contract English law requires that there must be 'a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly', and will infer such an intention 'when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts'.³⁶

35. Sinclair, The Vienna Convention on the Law of Treaties, p. 86.

36. Mac Nair, The Law of Treaties, at p. 6, with reference to the case *Rose and Frank Co. v. I.R. Crompton and Brothers Limited*, 1923 (see f.n. 1 at p. 6).

Starke explains:

A treaty may be defined as an agreement whereby two or more States establish or seek to establish a relationship under international law between themselves. So long as it attests an agreement between States, any kind of instrument or document may be a treaty irrespective of the form with which the text is clothed. Indeed, the term "treaty" may be regarded as nomen generalissimum in international law...³⁷

Czechoslovakia had not been allowed to participate in the negotiations among the Conference Powers on September 29, 1938 and she had consequently no influence whatsoever on the contents of the Munich Agreement. It was, therefore, impossible to bind her directly.

Treaties based on international law are agreements made by international law subjects empowered to sign such agreements whose aim is to create a legal bond in international law. The basis for the validity of the treaty under international law is not the declaration of intent leading to its conclusion made by the legal subjects, but the legal rule derived from international customary law: pacta sunt servanda.

"A treaty is a solemn compact between nations. It possesses in ordinary the same essential qualities as a contract between individuals, enhanced by the weightier quality of the parties and by the greater magnitude of the subject-matter. To be valid, it imports a mutual assent."

37. Starke, Introduction to International Law, p. 336.

"It need hardly be stated that the obligations of a treaty are as binding upon nations as are private contracts upon individuals. This principle has been too often cited by publicists and enforced by international decisions to need amplification here."

"It cannot be that good faith is less obligatory upon nations than upon individuals in carrying out agreements."

"From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchange of notes."

"Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals... and to be kept with the most scrupulous good faith."

"Pacta sunt servanda, ...an indisputable rule of international law, is but an expression of the principle of good faith which above all signifies the keeping of faith, the pledged faith of nations as well as that of individuals..."³⁸

One differentiates in international law between treaties in the strict sense, treaties, contracts (Verträge) and agreements, conventions (Vereinbarungen). An agreement in the sense of "Vereinbarung" - the expression was coined in 1899 by Professor Triepel - creates objective international law, because on both sides it deals with the same treaty contents. A treaty in the strict sense is the arrangement of objects of law, which take into consideration in various parts of the treaty conflicting interests.

38. Cheng, General principles of law, pp. 112-3.

Conventions differ from the bilateral legal transactions in that they arrange concrete affairs and do not determine general abstract norms of procedure or conduct.³⁹

With regard to the Munich Agreement, without addressing the question of the liabilities created thus for the participating parties, one refers to an international law treaty in the strict sense of the term,

39. Delbez writes (f.n. 29), p. 313: "Le lien contractuel a sa source dans un traité, traité-contrat, créant une situation juridique subjective, ou traité-loi, créant une situation juridique objective et institutionnelle. Dans les deux cas, et quelle que soit la différence entre les situations créées, c'est un accord de volonté que se trouve à la source, proche ou lointaine, de l'obligation. C'est pourquoi la théorie générale des traités ignore presque complètement la distinction entre traités-lois et traités-contrats et concerne aussi bien les uns que les autres." E.t.: The contractual bond has its origin in a contractual agreement, which gives rise to a subjective legal situation, or in a contract with the appearance of a statute which gives rise to an objective and institutional legal situation. Both cases - and whatever the difference between the two situations created - require unanimity of intent. This intent is to be found at the source of the obligation, either near or remote. That is the reason why the general theory of treaties ignores almost completely the difference between "laws of contract" and "contractual agreements", and why it concerns one as well as the other.

because a concrete case was solved by means of delineation of boundaries and cession of territory. One should not take offence at the use of the expression "agreement", which actually alludes to the second treaty form.⁴⁰ This "agreement", for the development of legal effects for and against a State, requires that it be based on the consent of the parties involved.

Lauterpacht expresses this clearly and succinctly:

A treaty being a contract, mutual consent of the Parties is necessary. ...International treaties are agreements, of a contractual character, between States, or organizations of States, creating legal rights and obligations between the Parties. Even before a Law of Nations, in the modern sense of the term, was in existence, treaties used to be concluded between States.⁴¹

40. This distinction which the International Court of Justice observes in Article 38, paragraph 1 (a): "The Court ...shall apply...international conventions, whether general or particular, establishing rules expressly recognised by the contesting States", should not be exaggerated in terms of actual practice. Strupp-Schlochauer, Wörterbuch des Völkerrechts, Bd. 3 p. 529 explains: "Ob ein Vertrag Vertrag heisst oder Abmachung, Abkommen, Acte final, Protokoll, Deklaration, ist vollkommen belanglos...Schwerwiegender erscheint der Versuch einer Einteilung in Vereinbarungen (traités-lois) und Verträge (traités-contrats)." E.t.: "It is of no consequence whether a treaty is called treaty, agreement, arrangement, final act, protocol, or declaration,...Much more difficult appears to be the attempt at classification into conventions and treaties."

41. Lauterpacht, International Law, Vol. I, p. 890, 877-8.

Schwarzenberger termed consensus ad idem one of the constituent elements of an international law treaty.⁴²

The Convention on the Law of Treaties pre-supposes the necessity of consensus among treaty parties as self-evident, as indicated in Articles 12-15, 17, where the agreement of a State to be bound by a treaty is mentioned as a condition of the treaty being valid.⁴³ No one disputes the necessity of achieving consensus.

Draft Article 2, paragraph 1 (a) on the Law of Treaties adopted by the International Law Commission defined a "Treaty" as

an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(e.g. treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, modus vivendi or any appellation).

42. Schwarzenberger, A Manuel of International Law, Vol. 1 p. 140.

"It is well established that in its treaty relations a State cannot be bound without its consent...." (I.C.J. Reports 1951, p. 21 (Genocide Convention, Advisory Opinion, May 28, 1951); also cited in: D.I.C.J. 1947-1958, p. 35).

43. UN Doc. CONF. 39/11/Add.2, pp. 290-1.

The commentary to this provision explains:

The term "treaty" is used throughout the draft articles as a generic term covering all forms of international agreement in writing concluded between States. Although the term "treaty" in one sense connotes only the single formal instrument, there also exist international agreements, such as exchanges of notes, which are not a single formal instrument, and yet are certainly agreements to which the law of treaties applies. ...the question whether...the expression "treaties" should be employed rather than "international agreements" is a question of terminology rather than of substance.⁴⁴

Brierly wrote in his first report to the I.L.C.:

A treaty is an agreement the essence of a "treaty" lies in the agreement or consensus brought into existence by the act of its formal conclusion. ...Not every agreement... is, however, a treaty. ...within the meaning of the present draft the use of term "treaty" is confined to the connotation of such agreements between international persons as establish relations under international law (i.e., create rights or obligations in international law) between the parties.⁴⁵

Parry explains:

Treaties...are binding because there is a rule of customary international law to that effect. They are not necessarily therefore a source of law but often...a source of obligation under the law.⁴⁶

44. UN Doc. Ibid., pp. 7-8; same text: Article 2, paragraph 1 (a) of the Convention ("treaty" means...etc.); see further Brownlie, Principles of Public International Law, p. 487-8.

45. UN Doc. A/CN.4/23, loc.cit. p. 227.

46. Parry, The sources and evidences of international law, p. 53.

Since a representative of Czechoslovakia was not present at the Munich Conference, they could not have agreed to the results of the Conference. Czechoslovakia was also not otherwise represented at the Conference by any other Conference Power, for she had not authorized either France or Great Britain to represent her.⁴⁷ On the contrary, in the note of September 21, 1938 addressed to the British and French Governments, the Czechoslovak Government explicitly declared that they fully expected all details to be settled with them.⁴⁸

ii) The Role as a Third State

Furthermore, according to international law treaties cannot impose obligations on third States.

This is clearly indicated by Article 34 of the Vienna Convention on the Law of Treaties which says:

A treaty does not create either obligations or rights for a third State without its consent.⁴⁹

47. It is possible in international law to have one subject of international law represent another. "States may appoint other states as agents for various purposes, including the making of treaties" (Brownlie (f.n.44), p. 515).

48. Celovsky, Das Münchener Abkommen 1938, p. 371.

49. UN Doc. A/CONF.39/11/Add. 2, p. 294.

As a logical consequence of the principle of sovereignty, it was also earlier determined that a State could not be made to incur obligations through a treaty concluded between two other States without its express consent.

The principle pacta tertiis nec nocent nec prosunt was valid for international law⁵⁰ to the effect that:

Treaties ... impose no legal duties on non-parties⁵¹ (without their consent).

This principle is widely recognized and the commentary on the I.L.C. Draft Articles of the Law of Treaties with regard to Article 30 declares:

50. Lauterpacht (f.n.41) Vol. I, p. 894.

51. Schwarzenberger (f.n.42), Vol. 1, p. 149.

In the Island of Palmas Case (Award of the Tribunal of Arbitration, April 4, 1928, in (1928) R.I.A.A. Vol. II pp. 831) Judge Huber said: "It appears further to be evident that Treaties concluded by Spain with third Powers recognizing her sovereignty over the Philippines could not be binding upon the Netherlands and, as such treaties do not mention the island in dispute, they are not available even as indirect evidence" (loc.cit. p. 850).

In another passage he stated: "...whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers..." (loc.cit. p. 842.).

...there appears to be almost universal agreement that in principle a treaty creates neither obligations nor rights for third States without their consent...There is abundant evidence of the recognition of the rule in State practice and in the decisions of international tribunals as well as in the writing of jurists.⁵²

The Harvard Draft on the Law of Treaties stated in Article 18:

A treaty may not impose obligations upon a State which is not party thereto.

In the comment to this Article is explained:

The principle of international law according to which treaties may not impose obligations upon third States is in line with well-known rules of Roman private law of contracts as expressed in the maxims: Obligatio tertio non contrahitur; Pacta non obligant nisi gentes inter quas initia. For States other than the parties, a treaty is res inter alios acta, quae tertio nec prodest nec nocet. This general principle is found in the modern municipal law of contracts of many countries.⁵³

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52. In the first session of the United Nations Conference on the Law of Treaties (1968) amendments to Draft Article 30 were submitted to the Committee of the Whole by Venezuela (UN Doc. A/CONF. 39/C.1/L 205/Rev. 1). Venezuela proposed the following text combine articles 30, 31, 32 and 33, in a single article reading as follows: "1. Treaties do not create obligations and rights for third States except with their express consent and under the conditions they establish. 2. The modification or revocation of the rights and obligations referred to in the foregoing paragraph shall require the express consent of the parties and of the third State, unless the treaty otherwise provides or it clearly otherwise appears from its nature and provisions" (UN Doc. A/CONF. 39/11, Add. 2, p. 152). The Committee of the Whole initially discussed Article 30 at its 35th meeting on April 23, 1968; the amendment of Venezuela was withdrawn (UN Doc. A/CONF. 39/11 pp. 191-3).
53. Harvard Draft on the Law of Treaties, loc.cit. p. 918.

There are difference of opinion as to whether there are exceptions to the pacta tertiis rule but this controversy only exists over the question whether a treaty creates rights for third States and not whether a treaty creates obligations for third States without their consent. And with regard to the latter issue, unanimity prevailed in the International Law Commission during deliberations on the Law of Treaties:

There was complete agreement amongst the members that there is no exception in the case of obligations; a treaty never by its own force alone creates obligations for non-parties.⁵⁴

In the North Sea Continental Shelf Cases (FRG v. Denmark; FRG v. Netherlands) the Judgement of February 20, 1969 states:

A treaty does not create rights or obligations for a third State without its consent, but the rules set forth in a treaty may become binding upon a non-contracting State as customary rules of international law.⁵⁵

How a treaty can create obligations for a third party is expressly indicated in Article 35 of the Convention on the Law of Treaties. According to this an obligation is created for a third party only

if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

54. UN Doc. A/CONF. 39/11/Add.2 p. 46.

55. I.C.J. Reports, 1969, p. 97.

Article 31 of the I.L.C. final Draft Articles⁵⁶
expressed this in other words:

An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be a means of establishing the obligation and the third State has expressly accepted that obligation.

This is, however, not an exception to the general rule, for as the International Law Commission during its deliberations recognized as well, the subsequent acceptance of an obligation by a third party creates, in point of fact, a new treaty between the original treaty parties and the third State.

In the legal sense, the obligation accepted by the third party is not based on the original treaty but rather on the second treaty to which the third State was a party.

That the third State would have to express its acceptance of the obligation in writing was only later included in the draft of the Law of Treaties presented by the International Law Commission. Originally the words "in writing" were not included in the proposal.⁵⁷
The requirement of the written declaration was first

56. Draft articles on the law of treaties with commentaries, adopted by the International Law Commission at its 18th Session, UN Doc. A/CONF. 39/11/Add. 2, pp. 7-93; article 31: p. 47.

57. Ibid., p. 47.

incorporated in the Convention on the Law of Treaties and therefore was not valid earlier.⁵⁸

In reality, therefore, when the provisions of Article 35 were determined, it was not a question of an exception to the general principle Pacta tertiis nec nocent, nec prosunt but rather a special form of the acceptance of a contractual obligation through agreement with the treaty partners of another treaty.

An example of this was given by the Permanent Court of International Justice in the case of the Free Zones of Upper Savoy and the District of Gex. The case concerned the applicability of the Versailles Treaty to Switzerland and the Court declared:

Mais...il est certain qu'en tout état de cause l'article 435 du Traité de Versailles n'est opposable à la Suisse, qui n'est pas partie à ce traité, que dans la mesure où elle l'a elle-même accepté.⁵⁹

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58. In the second session of the United Nations Conference on the Law of Treaties (1969) the Republic of Vietnam submitted the amendment to Article 31 (Article 35 of the Convention): "After the words 'that obligation' add the words 'in writing', May 6, 1969 (UN Doc. A/CONF.39/L.25). This proposal was not discussed in the Committee of the Whole, but submitted to the Plenary Conference by the Drafting Committee and adopted on the 14th plenary meeting, May 7, 1969. (UN Doc. CONF.39/11/Add.1, p. 59-60).
59. E.t.: But...it is certain that, in any case, Article 435 of the Treaty of Versailles is not binding upon Switzerland, who was not a Party to that Treaty, except to the extent to which that country accepted it (P.C.I.J., Series A./B, Fasc. No. 46, Judgement of June 7, 1932, p. 141).

The French territory around Geneva (in particular the "pays de Gex") belongs to Switzerland by reason of an arrangement of the Congress of Vienna. France attained in Article 435 of the Versailles Treaty, to which Switzerland is not a party, the approval of the treaty partners that a new arrangement of the zones which do not any longer correspond to present day relations should be a matter of concern and agreement between France and Switzerland exclusively. According to the compromise of October 30, 1924 the Court was to decide whether Article 435, paragraph 2 of the Versailles Treaty annulled the arrangements over the Free Zones in the Treaties of 1815/1816 and 1829 or rather served to occasion their repeal. The Court decided on June 7, 1932 that Article 435 of the Versailles Treaty neither annulled the above-mentioned arrangements nor served to occasion their repeal.

Other examples of exceptions to the rule that a treaty between two or more powers could not create obligations for a third party cannot be viewed as legitimate abrogations of the general principle.

For the most part it involves treaties which in particular concern the pacification of a certain territory or the use of a specific water-way. These treaties are concluded between the powers particularly interested in the territory or the water-way and lead quickly to the establishment of common practice respected by third powers as well. Indeed, international courts have asserted the applicability of these treaties to third states when disputes arose.⁶⁰

Thus, in this case it is not a question that a treaty grants a non-party rights or duties, but rather that the contents of a treaty concluded among several States become part of customary international law and in this manner only do obligations ensue for non-parties as well.⁶¹

60. See Brownlie (f.n.44), p. 500-1.

61. The comment to article 18 of the Harvard Draft Convention on the Law of Treaties explains:

While a treaty cannot create obligations binding on States other than the parties, it is conceivable that the failure of a third State to protest against a treaty the conclusion of which has been notified to it by one of the parties may give rise to at least a moral duty on the part of the third State to respect it, in the sense of refraining from doing

anything which would be incompatible with the objects sought to be accomplished by the treaty, and it is possible that the performance of this duty might result in the acquisition of corresponding rights for the third State, which the parties would be bound to respect. ...But recognition of the treaty by the third State must be formal or manifested by conduct which indicates an undoubted intention to recognize it. It is necessary to emphasize...that such recognition is not participation in the formation of the treaty; it does not therefore make the third State a party and does not produce the legal effects which participation in the making of the treaty produces.

According to some writers an exception to the general principle that treaties cannot impose obligations on third States is recognized in the case of collective treaties in the nature of "international settlements." Such treaties find their justification not upon legal principles but upon the acquiescence, of the States upon which they are imposed, or upon the ground that they are intended to serve the general interest...(loc.cit. p. 922).

Starke writes:

As a general rule a treaty may not impose obligations or confer rights on third parties, and indeed, many treaties expressly declare that they are to be binding only on the parties. This general principle, which is expressed in the Latin maxim pacta tertiis nec nocent nec prosunt finds support in the practice of States and in the decisions of international tribunals. The exceptions to it are as follows:...Treaties effecting an international settlement or conferring an international status on ports, water-ways, ect. may reach out to States non-parties.⁶²

Mac Nair explains:

The new feature which seems to be emerging is this. While in general it is true that pacta tertiis nec nocent nec prosunt, this maxim has certain qualifications, and, in particular, two classes of treaties have a law-creating effect beyond the immediate parties to them which is recognized though not yet well defined: (a) the first class consists of treaties which form part of an international settlement such as the treaties resulting from the Congress of Vienna in 1815, the Treaty of Paris, 1856, and the treaties of peace which concluded the World War; (b) the second consists of treaties which regulate the dedication to the world of some new facility for transit or transport such as a new canal or the right of navigation upon a river formerly closed. It frequently happens that a treaty becomes the basis of a rule of customary law, because all the states which are concerned in its stipulations have come to conform habitually with them under the conviction that they are legally bound to do so. In this case third states acquire rights and incur obligations which were originally conferred and imposed by treaty, but have come to be conferred and imposed by a rule of law.⁶³

62. Starke (f.n.37), p. 344.

63. Mac Nair, So-called State servitudes, loc.cit. p. 122-3.

Guggenheim holds to the theory that there are treaties with "territorial statute" (Territorial-statut), i.e., with an overwhelmingly local character, which determine the relations of a certain territory to such an extent that third parties as well are bound by such treaties.⁶⁴

This theory is very controversial, a fact demonstrated particularly during the negotiations of the Hay-Pauncefote Treaty between Great Britain and the U.S. of 1901 and the Hay-Varilla Treaty between the U.S. and Panama of 1903 which provided that the Canal should be free and open to vessels of commerce and of war of all nations.⁶⁵

64. Guggenheim (f.n.27), Bd. 1, p. 90.

65. "The canal shall be free and open to the vessels of commerce and of war of all nations observing the Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable" (Article III, Section 1 Hay-Pauncefote Treaty, November 18, 1901, *Nouveau Recueil Général des Traités et autres actes relatifs aux rapports de droit international*, Tome XXX, pp. 631-3 (632)). "The Canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section I of Article three of, and in conformity with all the stipulations of, the treaty entered into by the Governments, of the United States and Great Britain on November 18, 1903" (Article XVIII Hay-Varilla-Treaty, *Nouveau Recueil Général de Traités et autres actes relatifs aux rapports de droit international*, Tome XXXI, pp. 599-608 (605)).

The question was whether third parties in this way received the right of passage, i.e., whether they could claim rights from the treaty signed between the United States and Great Britain.

A further question was whether the treaty partners by means of a further treaty could abrogate the rights of third parties without their approval. Lauterpacht and Brownlie answer this question by contending that the treaty powers can alter treaties without the approval of third States if the treaty is not interpreted as an offer to third powers which the third powers accepted.⁶⁶ In the case of the Hay-Pauncefote Treaty, however, Lauterpacht indicates, with good reason, that contrary to the intention of the treaty powers to make an offer to third States, the fact speaks for itself ...

...that if the contracting parties had intended to do so, they probably would have embodied a stipulation in the treaty according to which the third parties concerned could accede to it.⁶⁷

Guggenheim's theory may be compared with the principle of state servitudes. There are

those exceptional restrictions made by treaty on the territorial supremacy of a State by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another State...The majority

66. Lauterpacht (f.n.41), Vol. I, p. 927; Brownlie (f.n.44), p. 500.

67. Lauterpacht, Ibid., p. 928.

of writers and the practice of States accept the conception of State servitudes although they do not agree upon its definition or extent...⁶⁸

Starke gives the following definition:

Under present practice, an international servitude may be defined as an exceptional restriction imposed by treaty on the territorial sovereignty of a particular State whereby the territorial of that State is put under conditions or restrictions serving the interests of another State. ...Servitudes must be rights in rem, that is, attached to the territory under restriction, and involving something to be done or something that the State bound by the servitude must refrain from doing on that territory. ...⁶⁹

Other writers are of the opinion that domestic law analogies have caused more harm than good in this sphere and consider that category to be useless and, indeed, misleading.⁷⁰

Mac Nair writes:

To enumerate a list of territorial restrictions and to call them servitudes proves nothing at all.⁷¹

But he comes to the following conclusion:

68. Lauterpacht, Ibid., p. 536.

69. Starke (f.n.37), p. 203.

70. See Brownlie (f.n.44), pp. 13-4, 295-6; Brierly, The Law of Nations, pp. 190-4.

71. Mac Nair (f.n.63), loc.cit. pp. 123.

(a) International law recognizes the existence of conventional restrictions upon territory which differ in juridical nature from the obligations in personam normally created by a treaty.

(b) The main guide as to the juridical nature of any particular obligation must be the intention of the parties to the instrument creating it. Did they intend it to be permanent, objective, and irrespective of changes of sovereignty, or did they intend it to endure only while the burdened and the benefiting territories remained under the same sovereignties?

(c) When the treaty creating the restriction is of the nature of an International Settlement or of a dedication urbi et orbi of some natural advantage or facility, the presumption is that the territorial restrictions created by it are intended to form part of the body of public international law. If indeed, as some would assert, they do not at once become so owing to a legislative virtue to be attributed to such treaties, they very soon become by tacit consent a part of customary international law and thereupon transcend the sphere of ordinary personal obligations.

(d) The attempt to apply to these restrictions the terminology and conceptions of the Roman law of servitudes is a legacy of a state's system that has passed away and will probably do more harm than good.⁷²

The jurisprudence of international tribunals has not recognized the existence of servitudes.

In the North Atlantic Coast Fisheries arbitration⁷³ the Permanent Court of Arbitration replied to the American argument that the liberties of fishery being accorded to the inhabitants of the United States "for ever" acquire, by being in perpetuity and unilateral,

72. Ibid., p. 126.

73. UN R.I.A.A., Vol. XI, pp. 167-226.

a character exempting them from local legislation, in other words, would constitute an international servitude in their favour over the territory of Great Britain; that the doctrine of international servitudes in the sense attributed to it in the American argument, being but little suited to the principle of sovereignty which prevails in States under a system of constitutional government such as Great Britain and the United States has found little, if any, support from modern publicists.

Because even if these liberties of fishery constituted an international servitude, the servitude would derogate from the sovereignty of the servient State...in so far as the exercise of rights of sovereignty by the servient State would be contrary to the exercise of the servitude right by the dominant State.⁷⁴

In the Åland Islands Case the question was whether the neutralization and demilitarization laid down in the Treaty of Paris of 1856 concluded between France, Great Britain and Russia was valid as well for the relations between Sweden, not a treaty power and Finland, Russia's successor as sovereign power over the Åland Islands. This question was decided in Sweden's favour by an international committee of jurists appointed by the Council of the League of Nations under Article 11 of the Covenant, not however by reason of the Swedish argument that the Convention of 1856 definitely created a real servitude attaching to the territory of the Ålands Islands.

74. Ibid., pp. 181-2.

To the Swedish argument it was replied, that

the existence of international servitudes, in the true technical sense of the term, is not generally admitted.⁷⁵

Therefore, the principle of state servitudes cannot be claimed as generally recognized international law.⁷⁶

If a treaty creates a new State -Guggenheim mentions the Krakau Republic created by the Congress of Vienna in 1815 and the Free City of Danzig created by the Treaty of Versailles⁷⁷- then the territorial statute contained in the treaty establishing the new State is inseparably bound with the new State to the extent that this could not at all exist without this statute. As soon as the new State is proclaimed, it is automatically bound by the statute.

There is also no exception to the principle that no State can be bound by treaties of third parties,⁷⁸

75. See Mac Nair (f.n.63), p. 114.

76. The Convention on the Law of Treaties in Articles 34-38 arranged the question of the obligation of third States by means of a treaty concluded without their participation according to the principles set forth (UN Doc.A/CONF.39/11/Add.2, p. 294).

77. Guggenheim (f.n.29), Bd. I, p. 91.

78. "A third State can, of course,... never incur an obligation or become subject to a direct liability by reason of a treaty, to which it is not a party - that is to say, it can never be placed in this position simply by reason of the treaty itself.

for with the recognition of this exception the complete sovereignty of the states affected ends.⁷⁹

iii) Adjudication

Nor is the legal provision of adjudication applicable in our case.

The doctrine of adjudication in international law as a special legal basis for the acquisition of territory is still very ambiguous⁸⁰ and, as a consequence, the

It may, however, be placed in that position by its own acts, in which case it becomes a consenting party and there is no violation of the rule that States can only be bound by their consent" (UN Doc. A/CN.4/130, Y.B. I.L.C. 1960, p. 90, Fifth Report by Sir Gerald Fitzmaurice).

79. Khashbat (Mongolia) said at the 35th meeting of the Committee of the Whole of the United Nations Conference on the Law of Treaties (April 23, 1968) "that the principle...that agreements imposed neither obligations nor rights upon third parties without their consent, was much more important in international law than in private law, because international law governed the relations between sovereign States. Article 30 (of the Draft) would thus safeguard the sovereign rights of States" (UN Doc. CONF.39/11, p. 191).
80. See Lauterpacht (f.n.41), Vol. 1, p. 546, f.n.1; Delbez (f.n.29), p. 269; Starke (f.n.37), p. 157; Wengler, Völkerrecht Bd. II, p. 979; Seidl-Hohenveldern, Völkerrecht, p. 199; O'Connell, International Law, Vol. 1, p. 483; Berber, Lehrbuch des Völkerrechts, Bd. 1, pp. 348; Dahm (f.n.28), Bd. 1 pp. 602; Brownlie (f.n.44), p. 127; Jennings, The Acquisition of Territory in International Law, p. 12-3.

concept is never presented in the same manner in the literature pertaining to this theme.

Whereas Lauterpacht considers adjudication merely as the allotment of territory by means of a judgement of an international court,⁸¹ without distinguishing whether the court reached its decision by reason of purely legal prescriptions or ex aequo et bono, Delbez⁸² considers adjudication as the allotment of territory by means of a community of States (Congress of Vienna, Congress of Berlin, League of Nations, UN) as well as by the decisions of international tribunals. He distinguishes, however, between a declarative adjudication which only recognizes that a territory belongs to a State by reason of an existing legal title, and an attributive adjudication which allots territory to a State, which is only possible if the responsible authority has the power to decide on the basis of equity.

Starke on the contrary considers adjudication merely an "award by a Conference of States" and views this as a special reason for acquiring territory.⁸³

81. Lauterpacht, loc.cit.

82. Delbez, end.c.

83. Starke, loc.cit.

Wengler as well does not consider it advisable to consider adjudication as the determination of boundaries by an arbitral tribunal, but rather the allotment of territory by means of third states or an international organ.⁸⁴

Seidl-Hohenveldern describes adjudication as the acquisition of territorial sovereignty by the parties and therefore considers it a variant of the contractual cession.⁸⁵ O'Connell lists arbitration awards and decisions of international courts as adjudication.⁸⁶

Berber differentiates between territorial allocation by means of an arbitral tribunal, court, and other authorities in international law, whereby he obviously attributes the name adjudication only to court decisions.⁸⁷

Brownlie considers adjudication as a decision by a judicial organ only, although he does not view this as a reason for the acquisition of territory.⁸⁸

According to Ziehen, adjudication is the acquisition of territory by award of an international law authority, either a court or peace conference. She indicates:

84. Wengler, loc.cit.

85. Seidl-Hohenveldern, loc.cit.

86. O'Connell, loc.cit.

87. Berber, loc.cit.

88. Brownlie, loc.cit.

Wenn in einem gerichtlichen Streiterledigungsverfahren einer Partei ein bestimmtes Gebiet zuerkannt wird, beruht die Entscheidung grundsätzlich auf einer Prüfung, welcher der Parteien nach geltendem Völkerrecht ein Rechtstitel auf Erwerb des umstrittenen Gebietes zusteht. Es handelt sich insoweit um ein reines Feststellungsurteil. Der Gebietserwerb ist hier nicht eine Folge des Urteils, sondern des im Urteil festgestellten Rechtsanspruchs. Das Urteil hat ausschliesslich deklaratorischen Charakter.

Die Adjudikation ist hingegen ein selbstständiger Gebietserwerbstitel. Falls sie durch gerichtliche Entscheidung ausgesprochen werden soll, setzt sie daher die Befugnis des Gerichts zur Schaffung neuer Rechtsverhältnisse ... voraus.⁸⁹

The distinction between decisions of the courts based on law and decisions ex aequo et bono has been made in Article 38 of the Statute of the International Court, where the law-based decisions of declarative character by reason of paragraph 1 are compared with decisions ex aequo et bono according to paragraph 2. Objections have

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89. Ziehen, Vollendete Tatsachen bei Verletzung der territorialen Unversehrtheit, p. 108. E.t.: If in a settlement of conflict court process a particular territory is awarded to one of the parties, the decision reached is based fundamentally on an examination as to which of the parties has a legal title to the acquisition of the contested territory according to international law. In this regard it concerns a mere declaratory judgement. The acquisition of territory is, in this case, not a consequence of the judgement but rather a consequence of the claims of law in the judgement. This judgement has an exclusively declarative character.

The adjudication is, on the contrary, an independent claim to the acquisition of territory. In the event that it is proclaimed by means of a court decision, it pre-supposes for that reason the authority of the court to create a new legal relationship... .

been raised against such a separation of decisions based on law and on equity, as it has been indicated that rules of law are often imprecise and no general agreement encompasses them all. Therefore

...there often is room for wide differences of opinion as to whether judges may have been influenced in a decision by consideration of what they conceived to be just and good.⁹⁰

It was to be discerned from the reasons presented in the judgement, however, whether the court determines that the winning side possesses a right to the disputed territory according to international law or whether it is based on considerations of ex aequo et bono. (With the restriction that this can refer only to the awards of international tribunals and not to the International Court of Justice; the latter may decide ex aequo et bono only if the parties agree so.) The reasons presented in the judgement can therefore be decisive. Reasons, which may have influenced the judges, but which are not mentioned in the decision, are not to be taken into consideration.

Jennings obviously makes this distinction as well when he says:

In the case where an arbitration is given power to determine frontiers, the decision may itself, perhaps, be a true mode of acquisition of territorial sovereignty.⁹¹

90. Moore, The Organization of the Permanent Court of International Justice, loc.cit. p. 380-1.

91. Jennings (f.n.80), p. 13.

If a court merely determines that the victorious State possesses a legal claim to sovereignty over the disputed territory, this judgement-notwithstanding its significance as a conflict decision - cannot be seen as the basis of the acquisition. The basis is rather the legal claim. The territory is not acquired through the judgement itself but rather on the basis of the reasons for acquisition presented by the court.⁹²

Actual adjudication takes place when an arbitral tribunal, established by agreement between the contending parties, decides not only according to rules of law but also according to the points of view aequo et bono. For Article 38 of the Statute of the International Court of Justice determines in paragraph 1 that the Court decides by reason of the generally recognized sources of international law. Paragraph 2 reads:

This provision shall not prejudice the power of the court to decide a case ex aequo et bono, if the parties agree thereto.

Therefore, it is not only necessary that the parties agree to a decision by the court, but also that they agree with a decision ex aequo et bono, so that the International Court of Justice may render an equity

92. See Ziehen (f.n.89), p.108; Wengler (f.n.80), Bd. II, p. 979, f.n.3; Delbez (f.n.29), p. 269; Dahm (f.n.28), Bd. I, p. 602-3.

decision.. If this special agreement is not forthcoming, the court can decide according to law only.

The ...paragraph indicates the intention of the States concurring in the establishment of the Court, that, while predominantly a Court of Justice, it should not be precluded from acting in a less rigid capacity, if the parties choose so to authorise it.⁹³

Whereas through Article 38 of the Statute for decisions of the International Court of Justice it is expressly prescribed that the parties had to have agreed to an equity decision in order that such a decision be indeed rendered, the same goes for arbitration.

Arbitration means the determination of a difference between States through a legal decision of one or more umpires or of a tribunal, other than the International Court of Justice, chosen by the parties. ...The treaty of arbitration usually stipulates the principles according to which the arbitrators have to give their award. These principles are normally the general rules of International Law, but if the parties so desire they may be rules of equity. ...⁹⁴

This last principle is also represented in international arbitral awards, as the British Government as arbitrator in the Argentina-Chile Frontier Case decided:

...since there was no Agreement between the Parties calling for the application of special rules or authorising the Arbiter to decide in the character of a friendly mediator, Her Majesty's Government instructed the Court

93. Lauterpacht (f.n.41), Vol. II, p. 69.

94. Ibid., pp. 22, 24.

on Article I (2) of the Compromiso, to reach its conclusions on the Question put to it "in accordance with the principles of international law."⁹⁵

If, therefore, an international court alone according to rules of law allots a certain territory to a party, this decision merely represents a confirmation that this territory belongs to the party, a confirmation based not on the decision of the court but rather on the basis of the reasons for acquisition, which the court in its decision identified.

If, however, an international court reaches an equity decision ex aequo et bono, this is not a confirmation but rather a formation judgement. Only on the basis of this decision is the territory acquired which did not belong to the State before.

The difference appears at first to be subtle and Article 38 of the Statute of the International Court of Justice has been assailed because of this difference.⁹⁶ But the difference follows clearly from the reasons of the judgement depending on whether the court decided by reason of considerations ex aequo et bono or only on the basis of rules of law.⁹⁷ But the acquisition of territory

95. UN R.I.A.A., Vol. XVI, p. 163, (Award: pp. 109-82).

96. Moore (f.n.90), pp. 380-1.

97. Kelsen writes: "The provision of Article 38, paragraph 1 - which does not appear in the corresponding Article of the Statute of the Permanent Court of International Justice -

by reason of a judgement which is based only on considerations ex aequo et bono always occurs by reason of mutual consent of the parties to such a decision, so that each of the parties assumes that the disputed territory belongs to it, although it agrees that the court may award the territory to the other party if the court so finds on the basis of ex aequo et bono. One views this adjudication therefore, as a limited cession.⁹⁸

Whoever submits to arbitration expresses thereby as well his acceptance of any decision reached, even in the event that this goes against him. This kind of adjudication through arbitration has often occurred in international law, as for example the Papal Arbitration of 1494 in the dispute between Spain and Portugal by means of which the New World was divided between these two States.

that it is the function of the Court to decide the disputes submitted to it 'in accordance with international law', is probably superfluous;...there is certainly no objection to paragraph 2 of Article 38, authorising the Court to decide a case ex aequo et bono, if the parties agree thereto.'...Since the principle of aequo et bono is a principle recognised in some legal systems as a part of positive law, Article 38, paragraph 1c (the general principles of law recognised by civilised nations) may endanger the application of...the bonum et aequum principle" (The Law of Nations, pp. 531-2, 534).

98. Wengler (f.n.80), Bd. II, p. 979 and f.n.3.

However, this kind of adjudication is not applicable in the case of the Munich Agreement, for neither Germany nor Czechoslovakia was able to agree on arbitration before the Conference convened. If adjudication is to be employed vis-à-vis the Munich Agreement, then it is a question of the third kind of adjudication, i.e., decision by the great powers or adjudication by an international Conference.⁹⁹ It is not at all a question of adjudication in the real sense of the term, but more a power-political decision, reached after large-scale wars with complicated territorial dislocations.

These forms of adjudication are often mentioned in the literature on international law and numerous cases pertaining thereto have been presented, in spite of the fact that the right to transfer territory cannot be established by means of this form of adjudication. Especially pertinent in this regard are the decisions of the Congress of Vienna, the Congress of Berlin, The Versailles Peace Conference, those decisions reached by the Allies during and at the end of the last war and numerous other cases. Upon closer examination one observes that in all these cases the States concerned with adjudication submit to the regulations either because

99. Starke (f.n.37), p. 279.

of obligations assumed through treaties or because of unconditional surrender.¹⁰⁰ In this manner they have agreed to the cession of the territory in question.¹⁰¹

International law neither gives law-making authority to the Great Powers nor may the Great Powers claim to negotiate in representation of the society of all States, for it has not been established that, and by what means, such a power of representation shall be bestowed on the Great Powers.¹⁰²

If the interested parties to a territorial question or the Great Powers themselves were to exercise the right to dispose of the territory of smaller States, this would mean that the principles of sovereignty, equality, and the inviolability of territory, which have long been accepted in international law and which have been precisely defined in the Charter of the UN, would be valid only for the Great Powers and not for the smaller States. With regard to the important area of territorial

100. Brownlie (f.n.44), p. 124; Wengler, Ibid., p. 979 f.n.3, Bd. I, p. 246, 849, f.n.2.

101. For Hatscheck-Strupp (Wörterbuch, p. 7), there exists one real case of an adjudication, the award of Skutari to Albania by the Great Powers in 1913. Montenegro refused to adhere to this decision and had to be forced to submit by international intervention.

102. Brownlie (f.n.44), p. 126.

territorial affiliation in international law, the law of the stronger would hold.¹⁰³

The frequently expressed view that the Munich Agreement represented an adjudication¹⁰⁴ is therefore not convincing.¹⁰⁵

iv) The Declarations of Czechoslovakia of
September 21 and 30, 1938 and Its
Subsequent Conduct

The Czechoslovak view, however, that the Agreement was reached without the participation of the Government

103. Ziehen (f.n.89), p. 114-5; Tunkin, Das Völkerrecht der Gegenwart, p. 156.

104. The thesis that the cession of the Sudetenland to Germany represented a genuine territorial adjudication is argued by François (Grondlignen van het Volkenrecht, p. 46), Schuschnigg (International law, p. 155) and Dahm (f.n.28), Bd. 1 p. 603 (among others).

Added to our considerations is the fact that not all interested parties participated in the Munich Conference, for the U.S., the U.S.S.R. as well as Poland and Hungary did not participate in the Conference.

105. Raschhofer, Die Sudetenfrage, p. 185, writes: "Das Münchener Abkommen war eine Entscheidung der vier europäischen Grossmächte, die...eine Gebietsfrage von gesamteuropäischer Tragweite aufgriffen und ihrer Entscheidung unterwarfen." E.t.: The Munich Agreement represented a decision of the four European Great Powers which took up a territorial problem of European importance and subjected it to their own decision. (With this remark Raschhofer approaches the principle of "collective territorial adjudication" as defined by himself.)

and was directed against Czechoslovakia¹⁰⁶ is founded on the historical misinterpretation that the solution of the Sudeten question was restricted to the Agreement among the four Conference Powers signed at Munich on September 29, 1938. The exact text of the agreement proves the contrary.¹⁰⁷

The Agreement concerning the transfer of Sudeten German territory had in principle already been reached before Munich. The conference itself was to deal subsequently with the conditions and modalities of this transfer. Thus, the Munich Agreement of September 29, 1938 considered by itself is a torso, merely a set of regulations which are incomplete in themselves and which leave the final decision to an International Commission. The understanding mentioned in the Agreement of September 29, said to have been achieved earlier, refers to the exchange of notes between Czechoslovakia, Great Britain and France on September 19/21, 1938.

During negotiations concerning the Sudeten problem, Great Britain and France acted primarily as mediators.¹⁰⁸

106. Kral, Das Abkommen von München 1938, p. 27.

107. Document No. 6, together with the Annex to the Agreement and the Declarations.

108. Wright, The Munich Settlement and International Law, loc.cit. p. 24-5.

After the failure of Lord Runciman's talks in Prague the British Prime Minister engaged in talks. The results of his negotiations and private talks with Hitler were communicated to the Czechoslovak Government via diplomatic channels. Due to these mediations both parties in conflict knew - and it also corresponded to their wishes - that the respective declarations of each party were communicated to the other. This becomes obvious in the letter the British Prime Minister wrote to Hitler on September 23, 1938.¹⁰⁹

Thus the declarations which were addressed to the mediating Powers by the two parties in conflict were in fact meant for each of the contesting States. This is also the reason why the basic Czechoslovak consent to the transfer of the Sudeten German territories to Germany - this consent the Czechoslovak Government communicated to the French and British Governments on September 21 -

109. The letter read as follows: "In my capacity as intermediary, it is evidently now my duty...to put your proposals before the Czechoslovak Government.

Accordingly, I request Your Excellency to be good enough to let me have a memorandum which sets out these proposals, together with a map showing the area proposed to be transferred, subject to the result of the proposed plebiscite.

On receiving this memorandum I will at once forward it to Prague and request the reply of the Czechoslovak Government at the earliest possible moment" (British White Paper, H.M.S.O., Cmd. 5847, No. 5; Akten, Nr. 574, p. 712).

has been considered evidence of the fact that an understanding had been reached with Germany in the Agreement of September, 29.

According to this interpretation it can be said that through the mediation of the French and British Governments the understanding of September 21, 1938 between the German Reich and Czechoslovakia was arrived at in a legal fashion.

However, it must not be overlooked that at the time of the Czechoslovak consent the two mediators as well as Czechoslovakia had regarded this understanding as the final solution of the Sudeten problem, and that the Munich Conference had become necessary only because Hitler uncompromisingly demanded German occupation of the transferred territories by October 1, 1938. Thus it was logical to assume that the transfer of the predominantly German territories of Czechoslovakia to the German Reich could be taken for granted and that the Munich Conference itself had only to deal with the modalities of the transfer.

This account of the immediate pre-history of the Munich Agreement makes it clear why the Munich Conference took place without the active participation of any Czechoslovak representative. The participation of the United Kingdom and France was due to their function as mediators whereas Italy's participation, due to the

intimate personal alliance between Hitler and Mussolini, was tolerated by the other participants as a contribution to a peaceful solution of the problem.

Nevertheless, it was assumed and considered a matter of course that the Munich Agreement would need the formal consent of the Prague Government before it could become effective. It was however not expected that Prague would reject the Agreement.

In the declaration of September 30, 1938 the Czechoslovak Foreign Minister expressed the view that Czechoslovakia's participation in the Conference had been confined to submission to the oppressive decisions of the four Powers. Because of his ambiguous formulation ("... submit to the conditions of the Munich Agreement which has come into being without Czechoslovakia and against her") doubts arose during and after the war whether this declaration could be regarded as an unequivocal consent to the Agreement of the preceding day.¹¹⁰ Not only Kimminich and other West German authors,¹¹¹

110. Kimminich, Das Münchener Abkommen in der tschechoslowakischen wissenschaftlichen Literatur seit dem zweiten Weltkrieg, p. 13; Compare also his speech at the symposium of the Institute of International Law of the University of Kiel held on March 27/29, 1971, Kimminich-Rumpf, Ostverträge etc., p. 180.

111. Dahm (f.n.29), Bd. 1, p. 592, f.n.11; Strupp-Schlochauer (f.n.40), Bd. 2, p. 555; Seidl-Hohenveldern, Das Münchner Abkommen im Lichte des Prager Vertrages von 1973, loc.cit. p. 454.

but also the Swiss Guggenheim and other distinguished scholars¹¹² interpreted the statement of the Prague Government as unrestricted consent.

A different reading of the Declaration of September 30, 1938 is hardly possible as it is clearly expressed that Czechoslovakia is ready to accept and to carry out the agreement even though she had not participated in the negotiations and her point of view had not been expressed. However, the declaration does not contain the words "consent" or "accept" but rather "submit". The use of this word implies that the Government accepted only because they saw themselves in a position of constraint. This important issue of constraint or duress will be discussed below.¹¹³

The Czech scholars Kral and Zourekeschew a thorough discussion of the Czechoslovak consent given in the declaration of September 30, 1938. Kral explains:

In der Erklärung der Regierung, in der sich diese dem Münchner Diktat fügt, wird nachdrücklich hervorgehoben, dass die Entscheidung ohne Beteiligung der Tschechoslowakei und gegen diese getroffen worden war. Das

112. Guggenheim (f.n.22), p. 240; Marek, Identity and Continuity of States in Public International Law, p. 283-4; Wright, loc.cit. p. 28; Taborsky, The Czechoslovak Cause, pp. 8-9.

113. Paragraph 1d) of the present Part of the thesis.

Abkommen von München ist der Tschechoslowakei unter Androhung des Krieges aufgezwungen worden, dies ist und bleibt eine historische Tatsache.¹¹⁴

This point of view, however, suggests that Czechoslovakia had given an affirmative declaration although this had taken place under compulsion. Zourek on the other hand simplifies the whole problem when he explains that Guggenheim's hypothesis, which maintains that Czechoslovakia had given her consent to the Munich agreement by the declaration of September 30, can be refuted by pointing out that the agreement did not after all represent a valid international treaty and could only be considered a pseudo-legal document whose only purpose had been to gloss over the international crime of an offensive war.¹¹⁵

Zourek's further objection - which he bases on jus cogens, pointing out that in his view due consideration must be given also to international law which developed after 1945 - that the Munich Agreement had violated the principle of sovereignty and equality of States,¹¹⁶ can be commented on as follows:

114. Kral (f.n.106), p. 27. E.t.: In the declaration of the Government in which they submit to the diktat of Munich, it is insisted that the decision had been made without and against Czechoslovakia. It remains a historical fact that the Munich Agreement had been forced upon Czechoslovakia by the threat of war.

115. Zourek, Unrichtige Ansichten über das Münchener Abkommen, loc.cit. p. 45.

116. See f.n.6.

The guideline for assessing according to international law the Munich Agreement, its legal prerequisites and the treaties that followed it, is the legal position as it presented itself in 1938/39. In doing this, we naturally agree with Zourek, since interference with the sovereignty and equality of a State does represent a breach of international law, though it does not violate the rules of jus cogens.

Seidl-Hohenfeldern writes:

Auf der Souveränität der Staaten beruht deren souveräne Gleichheit. ...Es handelt sich hierbei um...Gleichheit vor dem Recht...(Die) Verpflichtung, dieses Recht...zu respektieren,...geht bedeutend weiter als das Verbot der Anwendung bzw. Androhung militärischer Gewalt gegen einen anderen Staat. ... Man bezeichnet diese Verpflichtung ...auch als Interventionsverbot...Diese Rechte...haben...keine rechtliche Vorzugsstellung gegenüber ... (anderen) Völkerrechtsregeln. Sie sind also kein jus cogens.¹¹⁷

Article 1, paragraph 2 of the Charter of the United Nations speaks of respect for the principle of equal rights; Article 2, paragraph 1 states that the Organisation is based on the principle of the sovereign equality of all its Members.

117. Seidl-Hohenveldern (f.n.80), p. 251, 253. E.t.: Sovereign equality rests on the sovereignty of States...It is here a case of...equality before the law...(The)duty to respect this right...goes much further than a law prohibiting the use or threat of military force against another State... This duty...is also known as prohibited interference...These rights...do not enjoy a preferential position with regard to...(other) rules of international law. Therefore, they cannot be termed jus cogens.

Sovereignty means that a State possesses sole power over its subjects and its affairs.

Based on such premises, an agreement containing a valid cession of part of a State's territory constitutes an interference with the sovereign equality of Czechoslovakia. The same applies in general to agreements concluded voluntarily, but which in those days did not constitute a breach of international law.

It is unanimous that the actual Munich Agreement of September 29, 1938, represented only a partial settlement of the whole Sudeten German problem, and its provisions do not even represent the most relevant ones juridically.

The first section of the Munich settlement concerning the Sudeten German question includes the fundamental understanding that the problem should be solved by the transfer of the territories with predominantly German population to the German Reich. This had been agreed to in the exchange of notes of September 19 and 21, 1938.

The second section, the Munich Agreement in its more restricted sense, outlines the modalities and prescriptions concerning the implementation of the decision already made to form an International Commission whose function would be to prepare a plebiscite and fix the boundaries of the territories to be transferred to Germany. Furthermore, Germany was permitted to begin occupying certain territories.

The last section of the provisions concerning the question of the plebiscite (it was expected to conform to the principles of the Saar plebiscite), the final definition of the areas in which the plebiscite should be held and the supervision of the transfer of the designated territories had not yet been determined. These questions were finally settled by direct negotiations between the German and Czech delegates within the Commission and led to the bilateral Agreement of November 20, 1938 to which the Commission consented on November 21, 1938.¹¹⁸

In this Agreement the German and Czechoslovak Governments declared that they would not hold a plebiscite and would themselves determine the final boundary between their States. In this manner the Czechoslovak territory was transferred to Germany.

In spite of the provisions of the Munich Agreement of September 29, 1938, the contesting parties were obviously entitled to refrain from holding the plebiscite. Article 39, sent. 1 of the Convention on the Law of Treaties states that

a treaty may be amended by agreement between the parties.¹¹⁹

118. Documents (Germany) Ser. D, Vol. IV, pp. 164-5 (see Part I, f.n.52).

119. UN Doc. A/CONF.39/11/Add. 2, p. 294.

This does not represent a new principle of international law, for this idea has long been accepted.¹²⁰

Thus the arrangement of the Sudeten German question was accepted in each separate stage of its development by the Czechoslovak Government. And by fulfilling the obligations which were imposed upon them in the settlements they gave further evidence of their consent. The Czechoslovak Government evacuated the territories to be transferred to the Reich, sent delegates to the International Commission, and declared that they were willing to co-operate within this Commission.

Furthermore, they dismissed all Sudeten Germans from their armed forces and police units and pardoned all Sudeten Germans imprisoned for political crimes.¹²¹ Such a minute and detailed fulfillment of a treaty clearly shows that it was considered binding.¹²²

120. Lauterpacht (f.n.41), Vol. I, p. 937: "A treaty, although concluded for ever or for a period of time which has not yet expired, may nevertheless be dissolved by mutual consent of the contracting parties."

121. In accordance with paragraphs 3 and 4 of the Godesberg Memorandum (Akten (Part I, f.n.39), Nr. 584, p. 724).

122. Raschhofer writes: "Das Münchener Abkommen ist durch seine Durchführung, die mit der Übergabe des Gebietes an Deutschland begann und der Ziehung einer neuen Grenze schloss, ein erfüllter Vertrag und damit ein rechtskräftiges Völkerrechtsinstrument geworden. Die Feststellung der Vertragserfüllung traf der internationale Ausschuss am 21. November 1938: Unter

Erfüllung eines Vertrages ist die "erschöpfende und in der geschuldeten Weise bewirkte Leistung dessen, was versprochen war zu verstehen. Da die rechtliche Wirkung eines Vertrages gerade darin besteht, dass er zur Ausführung der versprochenen Leistungen verpflichtet, so erlischt die Verpflichtung, sobald die Leistung bewirkt ist" (Anzilotti). Die Verpflichtung bestand in dem Zusammenwirken der Signatare bei der Übergabe und Räumung des Sudetengebietes auf der Grundlage der Vereinbarungen vom 21. September und der Ziehung der neuen Grenzlinie unter gleichberechtigter Teilnahme der Tschechoslowakei. Diese Verpflichtung wurde erfüllt. In diesem Sinne stellt das Münchener Abkommen einen erfüllten Vertrag dar. Die Übertragung der Sudetengebiete wurde in der dort vorgesehenen Weise durchgeführt, wobei statt der Volksabstimmung eine zweiseitige deutsch-tschechoslowakische Regelung unter der zustimmenden Kenntnisnahme des internationalen Ausschusses erfolgte" (Raschhofer (f.n.105), p. 189).

E.t.: The Munich Agreement, through its implementation which began with the cession of territory to Germany and ended with the establishment of a new boundary, was a performed treaty and thereby became an instrument of international law with legal effect. The fulfillment of the treaty was ascertained by the International Commission on November 21, 1938: by fulfillment of a treaty is meant the exhaustive and effected execution of that which was promised. As the legal effectiveness of a treaty depends on the obligation and expires as soon as the service has been effected. The obligation consisted in the co-operation of the signatory powers during the cession and evacuation of the Sudeten territory on the basis of the agreements of September 21, and the establishment of the new boundary with the full participation of the Czechoslovak Government. This obligation was fulfilled. In this respect the Munich Agreement represents a consummated treaty. The cession of the Sudeten territory was executed in the foreseen manner, although instead of a plebiscite, a bilateral German-Czechoslovak arrangement, accepted by the International Commission ensued.

Moreover, in the domestic arena a whole series of decrees were promulgated, concerning the organization of the courts and the new financial requirements, for example, which were necessitated by the new delineation of State boundaries. Of importance further was a decision of the Permanent Committee of the National Assembly from October 27, 1938 by which the number of parliamentary mandates was decreased, reflecting the new situation created by the revision of borders. This last action is of particular significance because it did not arise from any obligation resulting from the Munich Agreement but rather was promulgated by an agent of the State without any external intervention. This action of the Permanent Committee and the subsequent approval of the decree by the Parliament indicate that they felt bound by the Munich Agreement.¹²³

123. The decrees were all approved by the Parliament according to Article 54, paragraph 15 of the Constitution. (Promulgation, December 6, 1938, Law No. 320).

Singbartl, Das Münchener Abkommen und seine Durchführung, claims (loc.cit. p. 13) that in the period from October 1938 to February 1939 about 50 government agreements and treaties were concluded.

c) The Fault of Disregard of the Constitution

1) The Legal Position

The Czechoslovak Government violated Article 64 of the Czechoslovak Constitution of February 29, 1920 by accepting the Munich Agreement.¹²⁴ Article 64 provided:

Der Präsident der Republik vertritt den Staat nach aussen, schliesst und ratifiziert internationale Konventionen, Handelsverträge, Verträge, die dem Staat oder den Bürgern irgendwelche Lasten oder Verpflichtungen auferlegen, sei es in Bezug auf das Eigentum, sei es in persönlicher Hinsicht, insbesondere hinsichtlich militärischer Lasten. Verträge, die eine Veränderung des Staatsgebietes mit einbegreifen, bedürfen der Zustimmung der Nationalversammlung und werden in Form eines Verfassungsgesetzes (Article I des Einführungsgesetzes) erlassen.¹²⁵

124. Michal, (f.n.6), loc.cit. p. 55.

125. Korkisch, Zur Frage der Weitergeltung des Münchener Abkommens, loc.cit. p. 95. E.t.: The President of the Republic represents the State. He concludes and ratifies treaties, international conventions, commercial treaties which contain obligations and responsibilities for the State or the citizens thereof either with respect to their personal property or to military obligations. Treaties which concern territorial changes need the consent of the National Assembly which is given in the form of a constitutional law according to Article 1 of the Introductory Law.

Transl. from the French text in Korkisch, loc.cit.: "Le président de la République: représente l'Etat à l'extérieur; conclut et ratifie les conventions internationales, les traités commerciaux, les traités imposant à l'Etat ou aux citoyens des charges ou des obligations quelconques, soit de propriété, soit personnelles, et spécialement des charges militaires; les traités impliquant des changements dans le territoire de l'Etat nécessitent le consentement de l'Assemblée nationale. Quant au changement de territoire de l'Etat, le consentement de l'Assemblée nationale est donné sous forme de loi constitutionnelle (art. I de la loi préliminaire)".

Article 1 of the Introductory Law in unison with Article 33 of the Constitution required a majority of three/fifths of all members in both houses for constitutional and territorial changes.¹²⁶

The Notes of the Czechoslovak Government of September 21, 1938 and September 30, 1938, the latter containing the acceptance of the results of the Munich Conference, had, before they were passed on, indisputably not received parliamentary consent.

Before the formulation of the rule in the Vienna Convention as to whether the constitutional restrictions imposed upon a government could exercise any restrictive influence on the legality of an international treaty, provided that the treaty itself had been concluded by the body constitutionally empowered to do so, was indicated, that ...there is no absolute agreement as to the international legal effect of constitutional limitations on the treaty-making capacity of States or constitutional restrictions or rules as to its exercise, ...¹²⁷

Three groups of opinions are represented, one of which indicates that treaties concluded in violation

126. Korkisch, Ibid.

127. UN Doc. A/CN.4/23/YB. I.L.C. 1950, p. 230.

of constitutional restrictions are not binding¹²⁸ because international law leaves it up to the States themselves to decide which agencies of the State will represent it in international legal transactions.¹²⁹ The opposing opinion states that international law cannot be altered by the municipal law of a State.¹³⁰ If a competent State authority, as for example a Head of State or Foreign Minister, delivered declarations on behalf of his country, then it was not significant for the determination of international obligations if this authority did not observe the domestic restrictions of State municipal law.¹³¹

128. Lauterpacht (f.n.41), Vol. I, p. 887.

129. Chailley, La nature juridique des traités internationaux, p. 180, writes: "...ce n'est pas au droit des gens, mais au droit constitutionnel en tant que tel qu'il appartient de déterminer les règles de compétence et de procédure, sans l'observation desquelles un traité ne pourra pas être considéré comme internationalement valide." E.t.: ...it is not the concern of public international law, but rather constitutional law, which is empowered to determine the rules of competence and procedure, without the regard for which a treaty cannot be seen as internationally valid. See also Dahm (f.n.29), Bd. 3, p. 23-30.

130. O'Connell (f.n.80), Vol. I, p. 239: "...the question whether constitutional law is to have the decisive voice in determining the international validity of a treaty, or whether a State is bound by the apparent authority of its agents, is one which only international law and not municipal law can answer."

131. UN Doc. A/CONF.39/11/Add.2, pp.60-1; Ross, A Text-book of International Law, pp. 203-208; H.R.I.L. (A.J.I.L. Vol. 29, Suppl. (1935), pp. 709-10).

Many writers, however, who defend the general principle that the international validity and binding force of treaties is determined by international law and not by the law of the parties, and that therefore constitutional provisions relative to the extent of the treaty-making power and the manner of its exercise do not, in general, have any international significance, nevertheless admit that such essential provisions as those which require the assent of the legislative chambers cannot be disregarded without affecting the validity of the treaty.

Sinclair explains:

In the main, doctrine is divided between what may, for purposes of convenience, be termed the constitutionalist and the internationalist schools. The constitutionalist school holds that international law leaves it to internal law to determine the organs and procedures by which the consent of a State to be bound by a treaty is formed and expressed, and that violation of a prescription of internal law renders void (or voidable) the expression of a State's consent to be bound. The internationalist school bases itself upon the theory that international law is concerned only with the external manifestations of the expression of a State's consent to be bound, and that the act of an agent who is competent under international law to bind the State and apparently authorised to do so in the particular case binds the State even if a prescription of internal law has not been complied with.¹³²

132. Sinclair (f.n.35), pp. 89-90.

A third opinion assumes an intermediate position but this however is interpreted differently. O'Connell renounces a general rule and proceeds according to each individual case, for example. He explains:

However, general statements are apt to mislead, and much depends upon the conduct of the parties.¹³³

On the other hand in its commentary on its draft article 43, the International Law Commission in 1966 attempted to formulate a general rule.

According to them (other jurists) good faith requires that only notorious constitutional limitations with which other States can reasonably be expected to acquaint themselves should be taken into account.¹³⁴

As a result of these opposing interpretations, it cannot be said that one of these viewpoints has acquired general acceptance and thereby the character of a principle of international law. As Brownlie indicates,

...no single view can claim to be definitive.¹³⁵

In a particularly instructive international law case -the East Greenland Case- the Permanent Court of International Justice concerned itself with this legal question.¹³⁶ In this conflict Norway claimed a particular

133. O'Connell (f.n.80), Vol. 1 p. 241.

134. UN Doc. A/CONF.39/11/Add.2 p. 60.

135. Brownlie (f.n.44), p. 494.

136. P.C.I.J. Ser. A/B No. 53, Legal Status of Eastern Greenland, pp. 36, 70.

area of East Greenland, whereas Denmark insisted that it enjoyed sovereignty over all of Greenland.

The Danish Government in a Statement of July 14, 1919 informed the Norwegian Foreign Minister:

Le Gouvernement danois s'est pendant plusieurs années occupé de la question d'obtenir la reconnaissance de la souveraineté du Danemark sur tout le Groënland de toutes les Puissances intéressées. ...Au cours des pourparlers avec les États-Unis d'Amérique... le Gouvernement danois souleva cette question en ce qui concernait la reconnaissance par le Gouvernement des États Unis et il obtint que celui-ci...donnât une déclaration dans laquelle est dit que les États-Unis ne s'opposeraient pas à ce que le Gouvernement danois étende à l'ensemble du Groënland ses intérêts politiques et économiques.

Le Gouvernement danois comptait que le Gouvernement norvégien ne ferait pas de difficultés au sujet du règlement de cette affaire.

The Norwegian Foreign Minister (Ihlen) answered on July 22, 1919 in an oral statement in which he made the following remark:

J'ai dit aujourd'hui au ministre de Danemark que le Gouvernement norvégien ne ferait pas de difficultés au sujet du règlement de cette affaire.¹³⁷

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137. Statut juridique du Groënland, Réplique danoise-Duplique norvégienne (Legal status of Eastern Greenland, Danish Reply.- Norwegian Rejoinder), P.C.I.J., Ser.C. No. 63, p. 837).

E.t. of the Danish Statement: The Danish Government has for some years past been anxious to obtain the recognition of all the interested Powers of Denmark's sovereignty over the whole of Greenland. ...During the negotiations with the U.S.A. ...the Danish Government raised this question in so far as concerns recognition by the Government of the U.S.A., and it succeeded in inducing the latter to agree that ... it would...not object to the Danish Government extending their political and economic interests to the whole of Greenland. The Danish Government is confident...that the Norwegian Government will not

Nevertheless, the Norwegian Government raised the objection that this declaration of the Norwegian Foreign Minister could not be binding because according to the Norwegian constitution he was not competent to give such a declaration. The Court decided, however:

The Court considers it beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.¹³⁸

The decision has all the more weight since all 12 regular members of the Court found for this judgement. Of the two ad hoc Judges named by the interested Parties, Anzilotti in his dissenting opinion shaved the view of the other Judges on this issue and explained:

No arbitral or judicial decision relating to the international competence of a Minister for Foreign Affairs has been brought to the knowledge of the court; nor has this question been exhaustively treated by legal authorities. In my opinion, it must be recognized that the constant and general practice of States has been to invest the Minister for Foreign Affairs - the direct agent of the Chief of the State - with authority to make statements on current affairs for foreign diplomatic representatives,

make any difficulties in the settlement of this question.

E.t. of the Ihlen-Declaration: To-day I informed the Danish Minister that the Norwegian Government would not make any difficulties in the settlement of this question (P.C.I.J. (f.n.136), p. 70).

138. P.C.I.J. (f.n.136), p. 71.

and in particular to inform them as to the attitude which the government in whose name he speaks, will adopt in a given question. Declarations of this kind are binding upon the State.

As regards the question whether Norwegian constitutional law authorized the Minister for Foreign Affairs to make the declaration, that is a point which, in my opinion, does not concern the Danish Government: it was Mr. Ihlen's duty to refrain from giving his reply until he had obtained any assent that might be requisite under the Norwegian laws.¹³⁹

The Eastern Greenland decision also influenced the efforts of the United Nations to codify the Law of Treaties in international law. Although the Vienna Convention came into existence long after the events of 1938 and 1939, it can be of significance nevertheless if it was supposed to represent a compilation of already existing standards of law. Therefore, the efforts along these lines have to be dealt with here, insofar as they concern the question of constitutional restrictions.

The codification of the International Law of Treaties by the United Nations whose drafting fell within the scope of the duties of the International Law Commission created by the General Assembly, is based on Article 13, paragraph 1, section (a) of the Charter. In accordance with its Statute (annexed to General Resolution 174 (II) of November 21, 1947), the International Law Commission decided on its first session 1949 to undertake the

139. Ibid., pp. 91-2.

codification of the Law of Treaties (together with Arbitral Procedure and the Regime of the High Seas) as one of the three topics of international law.¹⁴⁰

The first expert who reported, Brierly, presented to the Commission a draft proposal as a basis for discussion, article 4, paragraph 1 and 2 of which stated:

The capacity of a State or international organization to make treaties may be exercised whatever organ or organs of that State or organization its constitution may provide.

In the absence of provision in its constitution to the contrary, the capacity of a State to make treaties is deemed to reside in the Head of the State.¹⁴¹

Commenting on his suggestion, Brierly explained:

In view of the division of opinion as to the international legal effect of restriction of capacity to make treaties or of regulation of its exercise in the constitutions of States, it is open to the draftsman of a code of law of treaties to take up any one of three attitudes on the matter. ...It has been necessary, therefore, to decide between the recognition and the denial of the international legal significance of constitutional self-limitation upon treaty-making capacity. And, having regard to the prevalence and notoriety of provisions in the constitutions of States regulating the making of treaties, and to the existence of similar provisions in the constitutions of international organizations, notably the Charter of the United Nations, the former has been decided upon.¹⁴²

140. UN Doc. A/CN.4/19, YB. I.L.C. 1950, p. 196.

141. UN Doc. A/CN.4/23, YB. I.L.C. 1950, p. 223.

142. UN Doc. A/CN.4/43, YB. I.L.C. 1951, pp. 70-3.

In the following year the Special Rapporteur suggested further provisions as an alternative to the various but here not relevant sections of his proposal. The Commission tentatively accepted some provisions, among them Article 2.

A Treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose.¹⁴³

The previous point of view was therefore retained. In his third report of 1952 Brierly held to this viewpoint in a relatively unaltered interpretation of his Article 4, but, commenting on this, he mentioned the doubts which had been raised against his opinion.¹⁴⁴ Brierly resigned from the Commission which then elected Lauterpacht Special Rapporteur.

In his report of 1953 Lauterpacht declared:

The present report is intended primarily as a formulation of existing law,¹⁴⁵

but in his commentary on Article 11 of his proposal, he wrote:

The paucity and the inconclusiveness of the judicial and arbitral pronouncements on the subject make it difficult to deduce from them any rule of international law which is calculated to provide a practical solution to the problem involved. The present article attempts a solution of that nature.¹⁴⁶

143. UN Doc.A/CN.4/L.28, pp. 73-4 (73), Ibid., p. 73.

144. UN Doc. A/CN.4/54, YB. I.L.C. 1953, pp. 51-2.

145. UN Doc. A/CN.4/63, YB. I.L.C. 1953, p. 90.

146. Ibid., p. 144.

Once again it is expressed that Article 11 does not represent a formulation of existing law, but rather concerns the attempt to create a practical solution, which is to say to create new international law.

Article 11, paragraph 1 and 2 which Lauterpacht suggested, reads:

1. A treaty is voidable, at the option of the party concerned, if it has been entered in disregard of the limitations of its constitutional law and practice.

2. A contracting party may be deemed, according to the circumstances of the case, to have waived its right to assert the invalidity of a treaty concluded in disregard of constitutional limitations if for a prolonged period it has failed to invoke the invalidity of the treaty or if it has acted upon or obtained an advantage from it.¹⁴⁷

Commenting on this regulation, Lauterpacht expressly maintained:

Paragraphs 2 and 3 of article 11 are intended to provide the qualifications necessary to render the major rule just and reasonable. They take into account, in paragraph 2, the possibility that the State invoking the nullity of the treaty on account of the disregard of constitutional limitations may have tacitly accepted it by acting upon it....¹⁴⁸

Lauterpacht's successor as Special Rapporteur was Fitzmaurice who presented his own proposal on the Law of Treaties¹⁴⁹ which concerning the relevant question at issue stated:

147. Ibid., p. 92.

148. Ibid., p. 144.

149. UN Doc. A/CN.4/101, YB. I.L.C. 1956, pp. 104.

Article 22. ...1. Except where made ad referendum, a signature, which is the act of the State, can only be effected...(b) by a person having inherent capacity to bind the State by virtue of his position or office as Head of State, Prime Minister or Minister of Foreign Affairs.

Article 5. ...5. A State which has become bound by a treaty in a regular and lawful manner, is not absolved from carrying it out by reason of any requirements of or lacunae in its law or constitution ...

Article 23. ...The provisions of Article 15 to 22 above are, wherever this is relevant, to be read subject to the understanding, that the unauthorized acts of an agent are always open to validation on the part of his government, by means of a specific confirmation, or by conduct manifesting an unmistakable intention to adopt them as its own.¹⁵⁰

Fitzmaurice's viewpoint presented again the interpretation vis-à-vis the significance of the constitutional restrictions which Lauterpacht indicated was shared by a majority of writers.¹⁵¹ In relation to subsequent validation of unauthorized acts according to Article 23 of his proposal, Fitzmaurice said:

This is believed to be good law,¹⁵² and it is certainly convenient practice.

Fitzmaurice's successor as Special Rapporteur, Waldock, presented his initial report together with a partial proposal, Article 4, paragraph 3, section (b) of which said:

150. Ibid., pp. 111, 108, 112.

151. UN Doc. A/CN.4/63, Y.B. I.L.C., loc.cit., p. 142, f.n. 94.

152. UN Doc. A/CN.4/101, Y.B. I.L.C., loc.cit., p. 120.

Heads of State, Heads of Government and Foreign Ministers have authority, ex officio, to negotiate and authenticate a treaty on behalf of their State, and to sign, ratify, accede to or accept a treaty on its behalf; and they are not required to furnish any evidence of specific authority to execute any of these acts.¹⁵³

In his commentary on this regulation, he said:

In the case of Foreign Ministers, the inherent authority of the Minister to bind his Government in negotiations with a foreign State was expressly recognized by the Permanent Court of International Justice in the Eastern Greenland case...¹⁵⁴

In his second report Waldock explained:

The present Special Rapporteur has based his proposals upon the principle that the declaration of a State's consent to a treaty is binding upon that State, if made by an agent ostensibly possessing authority under international law to make the particular declaration on behalf of his State. In doing so, he has been guided primarily by the indications contained in international jurisprudence and State practice. ...¹⁵⁵

The International Law Commission revised Sir Humphrey Waldock's draft articles and published the new interpretation of the proposal, the relevant provisions of which read:

153. UN Doc. A/CN.4/144, Y.B. I.L.C., 1962, p. 38.

154. Ibid., p. 39.

155. UN Doc. A/CN.4/156 and Add. 1-3, Y.B. I.L.C., 1963, p. 44.

Article 4, para 2: In virtue of their functions and without having to produce an instrument of full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers of Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(b) Heads of diplomatic missions, for the purpose of adopting the text, of a treaty between the accrediting State and the State to which they are accredited.

(c) Representatives accredited by States to an international conference or to an organ of an international organization, for the purpose of adopting the text of a treaty.

Article 4 (bis): An act relating to the conclusion of a treaty performed by a person who cannot be considered under Article 4 as representing his State for that purpose is without legal effect unless afterwards confirmed by the competent authority of the State.

Article 31: A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation of its internal law was manifest.¹⁵⁶

The revised draft of the Law of Treaties was adopted by the International Law Commission and presented to the General Assembly with the recommendation to convene an international conference of plenipotentiaries to study the Commission's draft articles on the Law of Treaties and to conclude a convention on the subject.

By means of Resolution 2166 (XXI) of December 5, 1966, the General Assembly heeded this recommendation.¹⁵⁷

156. UN Doc. A/CN.4/L 117, pp. 4, 5; 18.

157. UN Doc. A/CONF. 39/11 p. XI. Revised draft articles: UN Doc. A/CN.4/L 117 (July 13, 1966).

The conference took place in Vienna in 1968 and 1969. On May 22, 1969 the Convention on the Law of Treaties was adopted.¹⁵⁸ At the same time two resolutions were accepted, one of which was the Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, in which it was stated:

The United Nations Conference on the Law of Treaties ...Deploring the fact that in the past States have sometimes been forced to conclude treaties under pressure exerted in various forms by other States, Desiring to ensure that in the future no such pressure will be exerted in any form by any State in connection with the conclusion of a treaty...Solemnly condemns the threat or use of pressure in any form, whether military, political or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent,... Decides that the present Declaration shall form part of the Final Act of the Conference on the Law of Treaties.¹⁵⁹

In the draft presented to the Conference, under Article 43 it was stated:

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation of its internal law was manifest.¹⁶⁰

Article 44 elaborated further, that specific restrictions on the authority of the representative of a State to express its consent to a treaty could be

158. UN Doc. A/CONF. 39/11 Add. 2, pp. 283-5 (UN Doc. A/CONF.39/26).

159. UN Doc. A/CONF. 39/11 Add. 2, p. 285.

160. Ibid., p. 59.

claimed as a reason for invalidity if these restrictions were brought to the knowledge of the other negotiating States prior to his expressing such consent.¹⁶¹

During the deliberations on draft Article 43 of the proposal in the Committee of the Whole,¹⁶² Peru and the Ukrainian Soviet Socialist Republic presented the proposal, accepted subsequently, whereby the words "and concerned a rule of its internal law of fundamental importance" were added at the end of draft Article 43.¹⁶³ Iran's motion to deny Heads of State any right to appeal to domestic restrictions in the conclusion of treaties ("If consent to be bound by a treaty has been expressed by a person authorized by the Head of State, a State may not invoke the fact that its consent has been expressed in violation of a provision of its internal law") had to be recalled because it found no support.¹⁶⁴

Rather, the motion proposed by Great Britain¹⁶⁵ was accepted whereby draft Article 43 is identical with

161. Ibid., p. 62.

162. Forty-third meeting of the Committee, UN Doc. A/CONF. 39/11, pp. 238-46.

163. UN Doc. A/CONF. 39/C.1/L. 228 (Peru) and UN Doc. A/CONF./39/C.1/L.228/Add. 1 (Ukrainian Soviet Socialist Republic) and Ibid., p. 238.

164. UN Doc. A/CONF. 39/C.1/L.280; A/CONF.39/11 p. 240.

165. UN Doc. A/CONF. 39/C.1/L.274; UN Doc. A/CONF. 39/11, p. 239.

Article 46 paragraph 1 of the Convention, with an addition in which the concept "manifest" was in paragraph 2 defined as follows:

A violation is manifest, if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Further deliberation on this Article in the Committee of the Whole did not bring any more changes.¹⁶⁶

The vote on the entire Convention on the Law of Treaties during the final plenary session of the Conference produced 79 votes in favour, 19 abstentions and one opposing vote - that of France. Thus, the treaty text was approved.¹⁶⁷

We arrive at the following conclusion:

Not only the completely conflicting judgements on the questions of law in international law literature, the opinions of the several Special Rapporteurs of the International Law Commission, the different interpretations of this question among the States of the Conference, but also the obvious efforts of the Commission to find a solution to this question of law leave no doubt that because of this lack of an unequivocal opinion in State practice, scholarly writings and jurisprudence on the effect of constitutional restrictions on the validity

166. UN Doc. A/CONF. 39/11/Add. 1 p. 88; UN Doc. A/CONF. 39/C.1/L.274.

167. Ibid., pp. 206-7.

of treaties, no arrangement of this problem could be discerned from existing international law when the International Law Commission started efforts to codify the most important principles of the Law of Treaties. In the year 1938 the legal situation was not different. An international law should rather be first developed and moulded in a form which corresponds to presentday relations in the international community and which makes possible efficient intercourse in international law.¹⁶⁸

Thus, at the time of the Munich Agreement it was not a recognized principle of international law that the lack of sanction of treaties by the internal organs of States, as prescribed in the constitutions of these States, prejudiced the treaties' validity.

It is also important to note that the acceptance of the Munich Agreement by the Czechoslovak Government on September 30, 1938 occurred with the unanimous approval of the responsible factions of the political parties and after exhaustive consultation and debate in the appropriate Committee under the chairmanship of the President of the Republic. This is revealed by the official Communiqué on the Governmental deliberations of September 30, 1938.¹⁶⁹

168. Strupp-Schlochauer (f.n.40), Bd. 2, pp. 228-30, 235-6.

169. Spengler, Zur Frage des völkerrechtlich gültigen Zustandekommens der deutsch-tschechoslowakischen Grenzregelung von 1938, p. 83.

The influence of this Committee is indicated by the fact that the decisions of the party leaders belonging to the Committee, in accordance with decisions of the Czechoslovak Courts, were binding on every representative under penalty of the loss of his mandate if he failed to abide by them.¹⁷⁰ Thus the Agreement of the party leaders legally carried the same weight as the unanimous approval of the Parliament.

It is also not the case that according to Czech law at that time the approval of the Parliament was necessary before a treaty could be concluded, because by reason of the Czechoslovak Law on the Defense of the State of May 13, 1936 the President of the Republic and the Government were authorized to issue emergency decree for the regulation of extraordinary circumstances, where otherwise a law could have been necessary.¹⁷¹

ii) Estoppel

The three parts of the whole Munich settlement including the exchange of notes from September 19/21, 1938, the Agreement of September 29, 1938 and the final settlement, the German-Czechoslovak Agreement of November

170. Armbruster-Klein-Münch-Veiter, Gutachten etc., loc.cit. p. 13.

171. Spengler, Ibid., pp. 80-1.

20, 1938 as it was accepted by the International Commission on November 21, 1938¹⁷² have to be viewed as one treaty because the first two parts, especially the first part, would make little sense if read separately. Independently, neither of these two parts could have had any practical effect.

If one considers the three sections as a unified treaty, then the Czechoslovak Parliament acceded to the treaty of November 20, 1938 with the requisite majority.¹⁷³ Even if one considers the three sections separately, however, the lack of parliamentary approval is remedied according to the principle of "estoppel".

This principle was developed in Anglo-American law and has subsequently found world-wide recognition.¹⁷⁴

172. Strupp-Schlochauer (f.n.40), Bd. 2, pp. 554-5.

173. Kimminich-Rumpf (f.n.110), p. 180.

174. Mac Gibbon, Estoppel in International Law, loc.cit. p. 468 writes: "...international judicial and arbitral activity has provided substantial grounds for the modern tendency to consider estoppel as one of the 'general principles of law recognized by civilised nations.' ...a State ought to be consistent in its attitude to a given factual or legal situation."

In the case concerning the Arbitral Award made by the King of Spain on November 18, 1906, Honduras v. Nicaragua (Judgment), (I.C.J. Reports 1960, pp. 191-239) was stated:

"The objection on the grounds of good faith which exists in almost all legal systems and which prevents a party from profiting by its own misrepresentation and which, in Anglo-Saxon law, is known as estoppel, would be applicable in the present case if it were proved that the action and behaviour of one of the

The legal thought behind this principle was not however unknown in the law of other States: there it was part of the principle of "Treu und Glauben"¹⁷⁵ and in Anglo-American law as well estoppel is grounded on considerations of good faith.¹⁷⁶

Behind the principle of estoppel lie maxims such as allegans contraria non audiendus est¹⁷⁷ and venire contra factum proprium.¹⁷⁸

Mac Gibbon explains:

What appears to be the common denominator of the various aspects of estoppel ..., is the requirement that a State ought to maintain towards a given factual or legal situation an attitude consistent with that which it was known to have adopted with regard to the same circumstances on previous occasions. At its simplest, estoppel in international law reflects the possible variations, in circumstances and effects, of the underlying principle of consistency which may be summed up in the maxim allegans contraria non audiendus est.¹⁷⁹

However, the doctrine's usefulness is somewhat limited due to the fact that either a general definition is too vague or the concept is so refined and restricted

States caused the other State to place reliance upon its acts of acquiescence and to believe in its renunciation of its right to dispute the validity of the award" (loc.cit. p. 222).

175. in English: "good faith".

176. Bowett, Estoppel before International Tribunals and its Relation to Acquiescence, loc.cit. p. 176.

177. Mac Gibbon, loc.cit. p. 469.

178. Strupp-Schlochauer (f.n.40), Bd. 1.p.441.

179. Mac Gibbon (f.n.174), p. 512.

that not all cases of estoppel are covered by it. Usually, scholarly writing and the decisions of tribunals supply the particular kinds of estoppel that have become known.

Above all else, recognition in international law contains an estoppel element irrespective of whether a constitutive or declaratory effect is attributed to recognition.¹⁸⁰ It is certainly understandable that the recognition of conditions, facts and laws plays an important role in the area of the principle of estoppel regardless of whether one concedes to recognition a constitutive or declaratory effect.¹⁸¹

By granting recognition, they (the States) do not undertake any commitment beyond not to challenge in future whatever they have previously acknowledged.¹⁸²

In international judicial and arbitral decisions as well an estoppel effect is conceded to such recognition. In a decision of the Conciliation Commission, established under Article 83 of the Treaty of Peace with Italy of July 9, 1962¹⁸³ the Commission said:

180. Mac Gibbon, Ibid., pp. 473-5.

181. Patel, Recognition in the Law of Nations, pp. 8-22.

182. Schwarzenberger, The Fundamental Principles of International Law, loc.cit. p. 253.

183. R.I.A.A., Vol. XVI, p. 219. ...la doctrine anglo-saxone de l'"estoppel" (the anglo-saxon doctrine of "estoppel" (loc.cit.)).

Le Gouvernement italien n'a reconnu devant aucun organe international que l'art. 78 par. 7 du Traité de Paix était applicable à l'ancienne colonie de la Somalie italienne. Ce n'est que si une telle reconnaissance avait été prononcée, que la Commission de Conciliation aurait été en mesure d'examiner l'applicabilité de l'objection résultant du principe de l'"estoppel" (non concedit venire contra factum proprium).¹⁸⁴

Just as a State is precluded from contesting the legal validity of a condition, a fact, or a law, because the State itself in cognizance of all the essential conditions had recognized this validity, so it cannot free itself because of this from an international obligation because of conduct which could render the obligation void.¹⁸⁵

After all, the conduct of the parties to a treaty is also a basis for the application of the principle of estoppel.¹⁸⁶ Judge Alfaro gave a definition of this

184. E.t.: The Italian Government has not recognized before any international organ that Article 78 paragraph 7 of the Treaty of Peace would be applicable to the former Italian Colony Somali. Only if such recognition had been expressed, would the Commission of Conciliation have seen itself in the position to examine the applicability of the objection which results from the principle of estoppel.

185. Mac Gibbon (f.n.174), p. 480 writes: "A State is barred from pleading its own default as a justification for avoiding its international obligations." See also Bowett (f.n.176), pp.183.

186. "Many of the cases on estoppel by conduct illustrate the simple principle that the law will demand consistency in conduct where the result of inconsistency would be to prejudice another party" (Bowett, Ibid., p. 186).

in the case concerning the Temple of Preah Vihear
(Cambodia v. Thailand):

Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (allegans contraria non audiendus est). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (nemo potest mutare consilium suum in alterius injuriam). A fortiori, the State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it (Nullus commodum capere de sua injuria propria). Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (venire contra factum proprium non valet).¹⁸⁷

In the Argentina-Chile Frontier Case the arbitrator stated in the award of December 9, 1966:

It seems clear...that there is in international law a principle, which is moreover a principle of substantive law and not just a technical rule of evidence, according to which "a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation."...

187. I.C.J. Reports, 1962, Judgement, 15 June 1962 (pp.1-146), separate opinion of Vice-president Alfaro, loc.cit., pp. 39-51 (40), p. 6; I.C.J.Y.B., No. 28, p. 168; See further: Eisemann, Petit Mahuel de la jurisprudence de la cour internationale de justice, pp. 119-27.

...This principle is designated by a number of different terms, of which "estoppel" and "preclusion" are the most common. But it is clear that these terms are not to be understood in quite the same sense as they are in municipal law. With that qualification in mind this Court will employ the term "estoppel".

In the Turkey-Irak Frontier Case the Court spoke of

the facts subsequent to the conclusion of the Treaty...can only concern the Court in so far as they are calculated to throw light on the intention of the Parties at the time of the conclusion of the Treaty,

and in the Corfu Channel Case (Merits) that

the subsequent attitude of the Parties shows that it was not their intention...to preclude the Court from fixing the amount of the compensation.¹⁸⁸

An Bowett concludes:

1. The rule of estoppel operates so as to preclude a party from denying the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit: as such the rule has been accepted by international tribunals.

2. The rule of estoppel is distinguishable both from the principle of 'res judicata' and the principle that, in cases of ambiguity in the meaning of an agreement, the subsequent conduct of the parties in carrying out the agreement affords evidence of its meaning.

3. The forms in which estoppel can arise are: ... (b) By Conduct.

188. The Argentina-Chile Frontier Case: R.I.A.A. (f.n.95), p. 164; the Turkey-Irak-Frontier Case: Publications of the P.C.I.J., Series B, No. 12, Collection of Advisory opinions, p. 24; the Corfu-Channel Case (Merits): I.C.J. Reports 1949, pp. 4-38, Judgement of April 9th, 1949, loc.cit. p. 25.

4. The essentials of estoppel are:
- (a) The statement of fact must be clear and unambiguous.
 - (b) The statement of fact must be made voluntarily, unconditionally, and must be authorized.
 - (c) There must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.¹⁸⁹

Although on the Continent the principle of estoppel met with some reservation,¹⁹⁰ it has been able to so establish itself in the decisions of international tribunals that no doubt can exist any more with regard to its binding force. Several authorities, like Mac Gibbon, Bowett and Friede¹⁹¹ have examined the principle of estoppel in view of the decisions of international courts and other scientific sources; they have unanimously come to the conclusion that the principle of estoppel has validity in international law. It is to be noted that Friede's work appeared in 1935, i.e., before the Munich Agreement.

The Convention on the Law of Treaties contains certain regulations which can be considered consequences of the principle of estoppel. Article 8 prescribes that treaties concluded by a person not authorized to represent

189. Bowett (f.n.176), pp. 201-2.

190. Friede, Das Estoppel-Prinzip im Völkerrecht, loc.cit. p. 517-8; Berber (f.n.80), Bd. 1 p. 419; Strupp-Schlochauer (f.n.111), Bd. 1, p. 441-2.

191. See Mac Gibbon (loc.cit. pp. 468-513; Bowett, (f.n.176), pp. 176-202; Friede, Ibid., p. 517-45.

a State for that purpose are without legal effect unless afterwards confirmed by that State. In the commentary to Article 7 of the Draft Article on the Law of Treaties (Article 8 of the Convention) it says:

On the other hand, it seems equally clear that, notwithstanding the representative's original lack of authority, the State may afterwards endorse his act and thereby establish its consent to be bound by the treaty. It will also be held to have done so by implication if it invokes the provisions of the treaty or otherwise acts in such a way as to appear to treat the act of its representative as effective.¹⁹²

This commentary clearly indicates that Article 8 of the Convention also includes estoppel by subsequent conduct.

The Czechoslovak Parliament, by reason of the ratification of the Treaty between the German Reich and the Czechoslovak Republic on Questions of Nationality and Option of November 20, 1938, by reason of the conclusion of the German-Czechoslovak Treaty on the final boundary of the same day, and finally by reason of the acceptance of the German-Czechoslovak Declaration on the Mutual Protection of the two peoples, whereby the boundary treaty was passed with the requisite majority,¹⁹³ indicated beyond any reasonable doubt that it approved

192. UN Doc. A/CONF. 39/11/Add. 2 p.14.

193. Kimminich-Rumpf (f.n.110), p. 180.

the over-all arrangement established between the German Reich and the Czechoslovak Republic.¹⁹⁴

Thus the Czechoslovak Parliament and Government, according to the principle of estoppel, forfeited the right to appeal to the lack of parliamentary approval.

d) The Objection of Duress

When analysing the legal position, one may certainly start from the assumption that at the conference with the British Prime Minister, Hitler threatened to solve the Sudeten German question by invading the Sudeten German territory of Czechoslovakia, and that this threat had come to the knowledge of the Czechoslovak Government.

The vital question in international law posed by this fact is how this situation should be resolved in the light of international law as it stood in 1938. The answer must clearly be that the threat of territorial occupation in case of a Czechoslovak refusal to cede the Sudeten territory uttered by the Reich's Government does not affect the validity of the Munich Agreement, since the international law in force at that time distinguished between duress against a representative of a State and duress against a

194. Spengler (f.n.170), p. 76; Armbruster (f.n.171), p. 14. See also f.n.123 of this Part of the thesis.

contractual party. Only the former was considered actionable. Based on the classical international law, this concept corresponded -until the creation of the United Nations- to the principle of the parties' freedom of will; nor was it curtailed by the Pact of Paris, though that particular principle had its origin in the jus ad bellum.

In point of fact until the formation of the United Nations there was a general conviction that coercion exercised by one State against another did not abrogate a treaty concluded under coercion. McNair writes:

The traditional opinion accepted by the majority of writers has, at any rate until recently, been that a treaty becomes and remains binding upon a State in spite of the fact that that State was acting under coercion in concluding the treaty...195.

With regard to the British practice he says:

It is believed that the United Kingdom has at no time expressed any dissent from the traditional doctrine that a treaty is not rendered ipso facto void, or voidable by one of the parties, by reason of the fact that such party was coerced by the other party into concluding it...196

The legal position in such a case today is clear, for Article 2, paragraph 4 of the Charter of the United Nations outlaws the threat of force in international

195. McNair (f.n.36) p. 207.

196. Ibid., at p. 208.

relations, and Article 52 of the Convention on the Law of Treaties states:¹⁹⁷

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.¹⁹⁸

At the time of the Munich Agreement the United Nations and the Charter did not yet exist nor did the text of the Convention of the Law of Treaties.

The Commentary to Draft Article 49 (Article 52 of the Convention) the following explanation appears:

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197. "The (Vienna) Convention (on the Law of Treaties) states in simple and categorical terms (Art. 52) that a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the UN Charter. It is perhaps the boldest and most decisive innovation in the history of the law of treaties. However, the Vienna Convention does not define what constitutes a threat or use of force in violation of the principles of the Charter, nor is any authoritative definition to be found elsewhere. This certainly would cast a cloud of doubt over the legal standing of many treaties against which claims of nullity may be asserted on this ground" (Agrawala, Essay on the Law of Treaties, p. xxxiii-iv).
198. In the Fisheries Jurisdiction Case, U.K.v.Iceland, Judgement: February 2, 1973 (I.C.J., Reports 1973, pp. 1-45), the I.C.J. stated (loc.cit. p. 14):
 "There can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void. Also: FRG v. Iceland (I.C.J. Reports 1973, pp. 46-91), Judgement on the same date, loc.cit. p. 59).

The traditional doctrine prior to the Covenant of the League of Nations was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. However, this doctrine was simply a reflection of the general attitude of international law during that era towards the legality of the use of force for the settlement of international disputes. With the Covenant and the Pact of Paris there began to develop a strong body of opinion which held that such treaties should no longer be recognized as legally valid. The endorsement of the criminality of aggressive war in the Charters of the Allied Military Tribunals for the trial of the Axis war criminals, the clear-out prohibition of the threat or use of force in Article 2 (4) of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this development in the law. The Commission considers that these developments justify the conclusion that the invalidity of a treaty procured by the illegal threat or use of force is a principle which is lex lata in the international law of to-day.¹⁹⁹

Rozakis points out, that the invalidity ground under Article 52 of the Vienna Convention on the law of treaties belongs to the category of "progressive development of law". He writes further:

The law on invalidity existing before the drafting of the Convention had not developed rules dealing either with sanctions against treaties whose conclusion resulted from a direct coercion of a party... Article(s) 52 represent(s) a novelty in international law introducing the public interest category of grounds, thus indicating a gradual evolution of the concern of States over the problems of the international community and a certain withdrawal of the prevailing individualism of the past.²⁰⁰

199. UN Doc. A/CONF. 39/11/Add. 2 p. 66.

200. Rozakis (f.n.33), p. 155-6.

He further states:

Article 52 introduces in the field of positive international law a ground which was formerly kept out of the law of invalidity: the direct coercion of a State to conclude an unwanted agreement.²⁰¹

Sinclair expresses the same view when he states:

Article 52 gave rise to lengthy discussion at the conference. The concept that a treaty may be void if its conclusion has been procured by the threat or use of force is of very recent origin. The traditional doctrine was that a treaty is not rendered null and void, or voidable at the instance of one of the parties, by reason only of the fact that such party was coerced by the other party into concluding it, whether the coercion is applied at the time of signature or of ratification or at both times. It was accepted that treaties procured by the threat or use of force were morally questionable, but it was argued that to place the stigma of nullity upon treaties procured by the threat or use of force would place in jeopardy all peace treaties entered into on the conclusion of hostilities.²⁰²

Even Article 32 half sent. 1 of the Havard Draft (1935)

As the term is used in this Convention, duress involves the employment of coercion directed against the persons signing a treaty on behalf of a State or against the persons engaged in ratifying or acceding to a treaty on behalf of a State;...

mentions relevantly only coercion committed against persons.

The comment reads as follows:

201. Ibid., p. 155, f.n. 11, "It is generally recognised that compulsion exercised against a state...does not render a treaty invalid" (Ross, Textbook of international law, p. 210).

202. Sinclair (f.n.35), pp. 96-7.

The term "duress" as used in this Convention does not include the employment of force or coercion by one State against another State for the purpose of compelling the acceptance of a treaty. The treaty-making representatives of the latter State may as a result of its defeat in war or the use of force against it, or as a result of other circumstances...find themselves under the necessity of giving their consent to a treaty when they would not otherwise do so. Such indirect compulsion is not, however, "duress" as the term is used in this Convention.

It is true, that in recent years there has been an increasing disposition among writers on international law to challenge the traditional view as to the right of one State to use force against another State and to impose upon the latter a treaty embodying such terms as the former State may see fit to demand. Such writers distinguish between the legitimate and the illegitimate use of force, or between its justifiable and unjustifiable use, ... It is the view of these writers that treaties imposed under the former circumstances are valid and binding, whereas the latter are not, or at least may be so declared by a competent tribunal or authority. They admit that the use of force or the threat of force against a State may, in particular cases, be justifiable, and therefore that a treaty obtained as a result thereof is binding, unless the terms of the treaty are in violation of international law. On the other hand, it is contended that pressure in the form of a war or threatened war would not be justifiable if the war were one, for example, which was forbidden by the Covenant of the League of Nations or the Briand-Kellogg-Pact, and a treaty extorted as a result of such action would not be binding on the party from which it was extorted.²⁰³

203. Harvard Draft, loc.cit. pp. 1148, 1152. The Harvard Draft Convention on Rights and Duties of States in Case of Aggression drawn up four years later, however, provided in Article 4, paragraph 3 (loc.cit. p. 1152-3) that: "A treaty brought about by an aggressor's use of armed force is voidable." It is now no longer possible to say that coercion is limited to the contractual party only.

There are some authorities on international law, though, who consider the principle of coercion against the State through international law as existing already at that time, and apply it also to the Sudeten settlement.²⁰⁴

In the first edition of his book published in 1937 Verdross writes:

Allgemein anerkannt ist..., dass ein Staatsvertrag anfechtbar ist, wenn gegen die Person des abschliessenden Staatsorgans Zwang angewendet oder angedroht wurde, um sie zum Abschluss des Vertrages zu bewegen.

Hingegen gehen die Meinungen über die Bedeutung des gegen den anderen Staat ausgeübten Zwanges auseinander. Eine weitverbreitete Lehre behauptet nämlich, dass ein solcher Zwang nicht rechtserheblich sei,... Hingegen lehrt schon Grotius,...dass...niemand verpflichtet ist, einen Vertrag zu erfüllen, der durch eine ungerechte Drohung oder durch eine Gewaltanwendung, die gegen die vereinbarte Treue verstösst, abgenötigt wurde. Auch bei anderen älteren Schriftstellern finden sich Spuren dieser Auffassung (Vattel, Heffter)... .

Bei der Lösung dieses Problems ist davon auszugehen, dass ein allgemeiner Völkerrechtssatz, der jeden Staatsvertrag, der durch eine Drohung auferlegt wurde, für rechtsverbindlich erklären würde, nicht nachweisbar ist. Die Gültigkeit solcher Staatsverträge ist daher nach den allgemeinen Rechtsgrundsätzen zu beurteilen.

204. See Brügel, AP Bd. 16, 1965, pp. 764, 765; Verdross, Quellen, pp. 61.

Brownlie writes: "The events leading to the Munich Agreement of September 29, 1938 and the acquiescence of many states in the face of the successful use of coercion cannot be reconciled either with any legal obligation concerning non-recognition or with the more fundamental obligations of the Covenant and Kellogg-Briand Pact" (Brownlie, International Law and the Use of force by States, p. 415).

Nach diesen, von allen Kulturstaaen anerkannten Grundsätzen ist aber ein durch eine widerrechtliche Drohung erzwungener Vertrag anfechtbar.

Staatsverträge, deren Zustandekommen mit einem rechtserheblichen Willensmangel belastet ist, sind jedoch nicht schlechthin ungültig (nichtig), sie sind nur, ganz oder teilweise, anfechtbar (vernichtbar). Die Anfechtung eines solchen Vertrages hat zunächst im diplomatischen Wege zu erfolgen.205

205. Verdross, Völkerrecht, 1. Aufl., p. 87-8.

E.t.: It is generally recognized that an international treaty is voidable if duress was used or threatened against the person of the contracting State organ in order to force the latter into concluding the Agreement.

There are divergent opinions, however, on the meaning of the coercion exercised against the other State. According to a widely-accepted doctrine, for instance, such a coercion is irrelevant at law. On the contrary Grotius tells...us that...nobody is under an obligation to fulfill an agreement extorted by means of an unfair threat or the use of force which violate the agreed loyalty. Traces of such a view can be detected also in other writers of the past (Vattel, Heffter)...

In the search for a solution to this problem one must assume that it is not possible to prove the existence of a general maxim of international law which would declare every international treaty imposed by threat as legally binding. The validity of such international treaties, therefore, must be judged in accordance with general legal principles. According to these principles recognised by all civilised nations, though, an agreement brought about by an illegal threat is voidable.

International treaties whose conclusion is encumbered with a legally relevant lack of intent, however, are not invalid (void) generally, they are only voidable (quashable) wholly or in part. Such a treaty must first be challenged through diplomatic channels. (Relevant lack of intent, e.g., coercion).

Lauterpacht takes a conciliatory position. His opinion is interesting because in the 5th edition of his textbook (of 1937) he changed his previously held views. Until the 4th edition (Vol. 1, at p. 711) he considered any coercion not exercised against the person of the negotiator himself as being insignificant in international law. In his 5th edition (Vol. 1, at p. 702) however, he takes note that the resolution of the League of Nations Assembly of March 11, 1932 and the Stimson Doctrine of January 7, 1932 undertook not to recognise any treaty or agreement contradicting the League of Nations Covenant or the Briand-Kellogg-Pact, and Lauterpacht earlier amends his statement to the extent of saying that coercion makes a treaty then null and void when it is exercised during a war waged counter the provisions of the League of Nations Covenant and the Briand-Kellogg Pact. Should the war, however, not be in violation of these instruments, or the belligerent country not be bound by them, then the coercion is no impediment to the validity of the treaty. Lauterpacht, thus, takes note of the legal changes in the field of the law governing warfare which these international agreements had brought about, and he draws corresponding conclusions for the validity of forcefully imposed treaties.

According to the statement made by Brierly before the Hague Academy of International Law in 1936, a dictated agreement ought to be just as valid as one concluded by

the parties of their own free will.²⁰⁶ In 1938 McNair could not yet give Great Britain's official view concerning the legal effect of an agreement which was at variance with the Covenant of the League of Nations or the Kellogg Pact and Rousseau saw only a reference point in the trend expressed in the Stimson Doctrine in 1944.²⁰⁷

From the Czechoslovak point of view Taborsky argues:

Taking everything together, we may say that agreement has been reached in two directions:

(a) Coercion exercised personally against the physical organs which are negotiating (or signing) international treaties, or which have to ratify them, render such treaties invalid.

(b) Any other pressure which is exercised besides that included under (a) does not vitiate peace treaties... .

In other cases there prevails a notable difference of opinion, the majority of international authorities being on the whole against the view that any pressure other than direct personal coercion against those who are negotiating or ratifying treaties should be considered as affecting the validity of international treaties. There are, of course, important voices in the other direction which, for instance, do not recognize the validity of treaties concluded under the threat of destruction of, or forcible assault upon, a State which refuses its assent to the conclusion of a treaty. There are, furthermore, writers who maintain that all agreements which are at variance with the fundamental principles of international law and their undisputed application are invalid or at least voidable.

206. Brierly, Règles générales du droit de la paix, end.c. p. 203-8.

207. McNair, The Law of Treaties (1938), p. 130; Rousseau, Principes généraux du droit international public, Tome I, p. 349.

Finally, there are authors who, while fundamentally allowing coercion (if it is not a question of personal violence directed against organs of the State) to be used in connection with the conclusion of international treaties, defend the view that so-called illegal pressure (i.e., that which is exercised in violation of some rule of international law) is not allowable, and sometimes consider treaties as invalid on the ground of the illegality of their object. ...

In what light does the Czechoslovak acceptance of the Munich Agreement appear to us to-day in connection with the above considerations?

There was no question of personal coercion being exercised against those who participated in the act of acceptance....however, by...the whole negotiations, which culminated in the conclusion of the Munich Agreement and its acceptance by Czechoslovakia...the Czechoslovak State during the whole course of these negotiations, and particularly in their final phase, was under the most serious and immediate threat of military attack. And the acceptance both of the Anglo-French proposals of 19th September, and of the Munich Agreement, was effected only because...the alternative which threatened was nothing less than destruction. The German threat of a military invasion was further in direct contradiction with the accepted rules of international law, and this both in respect of the Arbitration Treaty between Czechoslovakia and Germany of 1925, according to which the dispute should be resolved first of all by the peaceful means referred to above, and of the Briand-Kellogg-Pact of 1928, in which together with other States Germany solemnly declared that "she condemns resort to war for the determination of international disputes, she renounced it as an instrument of her national policy" and recognized "that the solution of all disputes of whatever nature and origin can be sought only by peaceful means."

According to the views of those who recognize that a threat in terms of destruction and coercion exercised in violation of the rules of international law abolishes the validity of international agreements, the Czechoslovak acceptance of the Munich Agreement would thus be invalid. It must be stated, however,

that the majority of international authorities would probably not regard the pressure which was exerted upon Czechoslovakia at Munich as sufficient to render that country's acceptance of it as invalid.²⁰⁸

Brosche cites in this connection the decision of a Dutch court (Raad voor het Rechtsherstel) of June 29, 1956 in the matter *Lienert and Klein v. Nederlandse Beheersinstituten*. In its ruling the court comes to the conclusion that the treaty concluded by Germany and Czechoslovakia in execution of the Munich Agreement of November 20, 1938 is completely void in law, since it came into being as a result of apparent, unavoidable and illegal coercion. Czechoslovakia signed the treaty only after agreeing under protest to cede the Sudeten territory following Germany's threat of war. This, though, implies also the nullity of the Munich Agreement.

This decision has been criticised. It is thought too dangerous to refer to a general nullity theory:

Die internationale Ordnung bedarf der Rechtssicherheit, die nicht dadurch gefördert wird, dass die Gerichte einzelner Staaten von sich aus Befugnisse in Anspruch nehmen, von fremden Mächten geschlossene Verträge ...gegebenenfalls für null und nichtig zu erklären.²⁰⁹

208. Taborsky, "Munich", the Vienna Arbitration and International Law, loc.cit. pp. 30-2.

209. Brosche, Zwang beim Abschluss völkerrechtlicher Verträge, p. 119. E.t.: International order needs legal security which cannot be promoted if courts of individual countries claim the right possibly to declare treaties concluded by foreign States... null and void.

The legal situation as it stood in 1938 was:

Although the League of Nations existed, the German Reich had withdrawn from the League in 1933. The provisions of the League of Nations Covenant therefore were no longer applicable to Germany.²¹⁰ Moreover, the Covenant of the League of Nations in general did not outlaw war, but rather prescribed ways for the peaceful settlement of disputes.²¹¹ However, the obligations under the Covenant of the League of Nations fell with Germany's withdrawal from the League. This notwithstanding, Great Britain,

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210. In the Comment to Article 18 of the Harvard Draft on the Law of Treaties is to be read:

"Article 17 of the Covenant of the League of Nations has sometimes been interpreted as being based on the theory that States which are not Members of the League, and therefore not parties to the Covenant, may nevertheless, in certain cases, be subjected to the sanctions envisaged by Article 16. Article 17 provides that, if a non-member State refuses to accept the invitation of the Council to assume the obligations of membership for the purposes of a dispute between it and a Member State and resorts to war against such Member, the sanction provisions of Article 16 shall be applicable as against it. But Anzilotti (1 Cours de Droit International, Gidel trans., 1929, p. 415), correctly, it is believed, declares that such an interpretation is without legal foundation. Article 17, he says, may and must be interpreted in a manner to reconcile it with the general principle that a treaty cannot impose obligations on States which are not parties to it" (loc.cit. p. 921).

211. "Prior to the conclusion of the (Paris) Pact, war constituted a legal remedy" (Lauterpacht (f.n.41), Vol. II., p. 184).

France and Italy intervened in 1938 to settle the German-Czechoslovak conflict without recourse to war.

This puts an end to the objection raised by Zourek concerning the nullity of the Munich Agreement on the ground of violation of Article 10 of the League Covenant.²¹² This article guarantees territorial ownership protection through members of the Federation against foreign attack, and lays down an arbitration procedure which could affect also non-members (Articles 15, 17 of the Covenant).

The resolutions based on Article 10 which were passed by the League of Nations Assembly were binding only on League of Nations members. They were thus binding - in the case of the Munich Agreement - on France, Great Britain and Italy. This, however, is outside the scope of the present thesis which is solely concerned with the validity of an agreement made between Czechoslovakia and the German Reich. This agreement, though, did not affect the objection raised by the League of Nations. Moreover, it does not necessarily mean that treaties violating Article 10 of the Statute were void. This is, in fact, very unlikely, since a pure rule of procedure such as this does not embody a nullity ground based on property rights - not even Article 20 of the Covenant, which

212. See the text of f.n.3, paragraph 1 and Zourek's essay in "Le Monde", April 4, 1968.

contains a legal obligation not to conclude agreements going counter to the Covenant.²¹³

Since the Covenant of the League did not outlaw war, the outlawing of war was striven for outside the Covenant. This led to the signing of the Pact of Paris for the renunciation of war on August 27, 1928. This Pact condemns recourse to war for the solution of international controversies. In Article II of the Pact the States agree that the settlement or solution of all conflicts shall never be sought except by pacific means.

In Lauterpacht's opinion this Pact permitted without restriction recourse to measures of force short of war.²¹⁴ Lauterpacht distinguishes between war, measures of force short of war and an ultimatum. The distinguishing feature of a measure of force short of war is, according to him, that, although measures of force are also harmful measures, the actions of the contesting parties, as of third States, are not considered measures of war and diplomatic and economic relations continue, as do treaties between the parties. With regard to an ultimatum, even if war is threatened if it is refused, in Lauterpacht's view this is not to be interpreted as compulsion.²¹⁵

213. Zur Problematik der Regeln der Streiterledigung unter dem Völkerverbund (On the problem concerning the settlement of disputes under the League of Nations), Berber, Bd. 3 p. 51.

214. Lauterpacht, Ibid., p. 185.

215. Lauterpacht (f.n.41), Vol. I, pp. 132-3.

Although this interpretation is no longer valid to-day in consequence of the regulations in Article 2, paragraph 4 of the UN Charter, Lauterpacht's view predominated between the wars to the extent that it greatly influenced the practice of States; war-like conflicts were no longer considered "war" but rather military reprisals.

Delbez writes:

Dans la Charte, les Etats renoncent à la menace ou à l'emploi de la force et le concept de force est certainement beaucoup plus extensif que celui de la guerre. Tombent ainsi sous le coup de l'article 2, paragraph 4, toutes les manifestations possibles de la violence, même celles qui sont considérées comme ne créant pas juridiquement l'état de guerre, telles les représailles armées. Compatibles avec le Pacte Briand-Kellogg, elles ne le sont plus avec la Charte.²¹⁶

The decisive point is, however, what the practice of States was at this time. Immediately after the conclusion of the Pact, there were a number of armed conflicts between States and the only effect of the Pact

216, Delbez (f.n.38), p. 399. E.t.: In the Charter the States renounced the use or threat of force and the concept of force is certainly more comprehensive than the concept of war. Included under Article 2, paragraph 4 are all possible manifestations of force, even those which legally are not considered such, which contribute to a State of war, as for example armed reprisals. While they were consistent with the Kellogg-Briand Pact, they are not any longer consistent with the Charter.

was that these conflicts were not considered "wars", but rather police actions, reprisals and the like.

This was reflected in attitudes to the conquest of Manchuria in 1931 by the Japanese,²¹⁷ the conquest of Ethiopia by Italy, the subjugation of the Baltic States by the Soviet Union, different armed conflicts in South America,²¹⁸ as well as the conflicts between Japan and China dating from 1937.²¹⁹

The practice of avoiding the use of the term war shows clearly that the States proceeded from the idea that only war was outlawed by the Pact and not armed intervention, not to mention the mere threat of such.

Tunkin maintains as well:

Es ist bekannt, dass die Kolonialmächte es vorzogen, die von ihnen...geführten Kriege "militärpolitische Massnahmen", "Repressalien", "bewaffnete Konflikte"... zu nennen, um auf

217. Strupp-Schlochauer (f.n.40), Bd. 2 p. 371.

218. Brownlie, International Law and the use of force by States, pp. 77-8.

219. It cannot be maintained that the Pact of Paris changed the practice of States. Of course the alleged practice of States in the sense of a ban on the threat of force by means of the Kellogg Pact is cited in the literature (see Brownlie, Ibid., pp. 87-8), but it was really only that States criticized the actions of other States in international relations with reference to the Pact of Paris. However, when it came down to actual deeds and not just declarations, relations and facts which arose as a consequence of the violation of the ban on war were accepted by all parties, as for example in the case of the Baltic countries.

diese Weise zu dokumentieren, dass solche Aktionen nicht unter den Geltungsbereich des Pariser Paktes fallen.²²⁰

And with regard to the threat of force, until the establishment of the United Nations a generally held belief did not exist that such a threat influenced the validity of the measures adopted subsequently between the State threatened and the State which issued the threat.

Even the Nuremberg Tribunal concerned itself with the ban of war only and not with the threat of force. Indeed, it was not until the creation of the United Nations that the threat of force was also outlawed in international law by reason of Article 2, paragraph 4 of the Charter.

Brownlie maintains:

The travaux préparatoires (to Article II of the Pact of Paris) indicate that the conclusion of threats was not contemplated as no mention is made of them.²²¹

As a basis for his view that the threat of force was also outlawed by the Kellogg-Pact, Zourek cites²²²

220. Tunkin (f.n.103), p. 161-2. E.t.: It is well-known that the colonial powers preferred to call the wars...led by them, "military-police actions", "reprisals", "armed conflicts"...in order to document the fact that such actions did not fall under the scope of the Paris Pact.

221. Brownlie (f.n. 217), p. 89.

222. Zourek (f.n.115), p. 47.

the Resolution of the League of Nations of March 11, 1932, which declares that it is incumbent upon the members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris.²²³ The Resolution has then a double character: first, it appeals to the binding character of the Pact of Paris, presents vis-à-vis the Pact no further obligations, and is therefore only declaratory, Secondly, it binds the League members to the Stimson-Doctrine.

This doctrine takes its name from a note of U.S. Secretary of State Stimson of January 7, 1932 to China and Japan, in which the American Government expressed its determination not to recognize any situation, treaty or agreement which may be brought about by means contrary to the League Covenant and the obligations of the Pact of Paris of August 27, 1928.²²⁴

223. League of Nations, Official Journal, Special Supplement No. 101, Vol. I, 1932, pp. 87-8.

224. The Note by the United States to China and Japan runs as follows:

"In view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Government of the Chinese Republic and the Imperial Japanese Government that it cannot admit the legality of any situation de facto

nor does it intend to recognize any treaty or agreement entered into between these governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the Open Door Policy; and that it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States, are parties" (A.J.I.L. Vol. 26 (1932), p. 342).

See further Strupp-Schlochauer (f.n.40), Bd. 3 p. 393-6 (394).

The legal significance of the Stimson Doctrine is disputable,²²⁵ and under no circumstances could it create obligations for non-members of the League, for the League could not even create obligations for all the Member-States without the consent of every Member. It should be recalled that all the Great Powers were never Members of the League at the same time. The U.S. was never a Member at all, and Germany and Italy had left the League even before the Soviet Union became a Member. Lauterpacht assumes therefore, that the Stimson Doctrine bound only those Member States which expressly agreed to it.²²⁶ But even most of the States which accepted the doctrine did not adhere to it, as they recognized Italy's conquest of Ethiopia and the Soviet Union's acquisition of Latvia, Lithuania and Estonia.

It can be concluded, therefore, that the Stimson Doctrine did not establish any further obligations for States.

Thus, in the literature of international law before the Second World War the Munich Agreement was seen in the main as valid. Markus, for example, bases his argument

225. See Wehberg, Die Stimson-Doktrin, loc.cit. p. 434-5; Zimmer, Gewaltsame territoriale Veränderungen und ihre völkerrechtliche Legitimation, p. 19-20; Bilfinger, Die Stimson-Doktrin, p. 10-1.

226. Lauterpacht (f.n.41), Vol. I, p. 143-4.

that the Treaty of March 15, 1939 was invalid on the consideration that this treaty violated the Munich Agreement.²²⁷ Taborsky writes:

It must be stated, however, that the majority of international authorities would probably not regard the pressure which was exerted upon Czechoslovakia at Munich as sufficient to render that country's acceptance of it as invalid.²²⁸

Rousseau cites a whole series of reasons why the Munich Agreement was invalid, but he never mentions any legally relevant kind of pressure or duress.²²⁹ Even in 1942 Cassin considered the Munich Agreement as théorétiquement intacte.²³⁰

The attitude of the Member-States of the League of Nations at this time gives a very good indication of the accepted practice of States at the time of the Munich Settlement. The United Kingdom and France, both as mediators and as contracting Powers, participated in the Munich Agreement and thereby expressed their conviction that the conclusion of the Agreement in the done way was

227. Markus, Le traité german-tchécoslovaque du 15 mars 1939 à la lumière du droit international, end.c. pp. 653-4.

228. Taborsky (f.n.112), p. 16.

229. Rousseau, L'accord du Munich et le Droit international, end.c. p. 107.

230. Cassin, La position internationale de la Tchécoslovaquie, loc.cit. pp. 61-2 ("theoretically intacte").

valid, especially was the manner in which the German demands layed down in the Godesberg Memorandum were realized viewed as a legitimate means of concluding the treaty. A lot of States, in particular the world Powers, to all intents and purposes recognized the validity of the Munich settlement in that, after the agreement, they treated the former Czechoslovak citizens, who had now become German, as Germans, e.g. recognized their German passports as valid. Accordingly, the Munich Agreement was welcomed by world public opinion as a peaceful solution to the crisis situation.

The validity of the Munich Agreement thus was not questioned by any State before the Second World War.

Because it cannot be established that at the time of the Munich Agreement generally accepted international law or the Kellogg-Briand Pact outlawed the threat of force in concluding a treaty,²³¹ authors such as Zourek appeal not on the basis of a threat to use force but rather on aggression committed when the Sudeten German "Freikorps" undertook action on Czechoslovak territory in arguing that the Munich Agreement was invalid. But this thesis is not convincing, for it was never seriously contended that the volunteer corps was a military threat to Czechoslovakia.²³²

231. Brownlie (f.n.218), p. 404.

232. Kimminich (f.n.110), p. 16. But Zourek (f.n.115), p. 46 writes:

"Die Aggression gegen die Tschechoslowakei wurde am 17. September 1938 eingeleitet, als Henlein durch den reichsdeutschen Rundfunk auf Befehl Hitler's den "Freikorps"-Truppen, die vom Reich ausgerüstet und von Offizieren der Nazi-Wehrmacht befehligt wurden, die Order zur Einleitung der Kampfaktionen gegen die tschechoslowakische Republik erteilte. In dieser Aktion muss daher eine Angriffsaktion des Reichs gegen die tschechoslowakische Republik vorgenommen durch Vermittlung bewaffneter Truppen der sudetendeutschen Partei erblickt werden."

E.t.: The aggression against Czechoslovakia started on September 17, 1938 when, by order of Hitler, Henlein gave the "Freikorps" troops - who had been equipped by the Reich and were led by officers of the Nazi Wehrmacht - the order to begin combat actions against the Czechoslovak Republic. This act must therefore be seen as an act of aggression of the Reich against the Czechoslovak Republic, executed through the agency of armed troops of the Sudeten German Party.

Thus, it cannot be maintained that the Czechoslovak Government agreed to the Munich Settlement as a result of aggressive actions of the volunteer corps.²³³ Rather the accusation can be made that the Reich took aggressive actions against Czechoslovakia when forces of the volunteer corps, armed on German territory, fought on Czechoslovak soil. This means that the German Government supported armed groups of Sudeten Germans, who at that time were Czechoslovak citizens.

For more than fifty years, first in the League of Nations and then within the scope of the United Nations, it has been debated whether such practices constitute aggression.²³⁴

233. Zourek, Ibid., p. 46-7.

234. The General Assembly of the UN addressing itself to this important question created, in accordance with Resolution 688(VII) adopted December 20, 1952, a Special Committee on the Question of Defining Aggression with the assignment to work out by 1954 relevant suggestions on this theme. After deliberations in the General Assembly from November 23-29, 1954, the matter was postponed until the 11th Session (1956), in accordance with Resolution 895(IX) from December 4, 1954. At this time the Special Committee delivered a report. By means of Resolution 1181(XII) the General Assembly resolved to authorize the Secretary General to request that the new member-States take positions on the matter and that the Special Committee continue its work. A revised report was to have been delivered at the 14th Session in 1959.

The General Assembly could not decide how to handle this matter in the succeeding years and postponed further deliberation on the matter, first until 1962 then until 1963. Even after this date it was felt that discussion on aggression had not sufficiently developed to allow any final settlement. Moreover,

no member of the Special Committee, as foreseen, moved to have the Committee convened earlier than arranged for, including the entire period up to 1967. Nevertheless, Resolution 2160(XXI) of the General Assembly adopted on November 30, 1966, which called for strict adherence to the renunciation of the threat ~~and~~ and use of force in international relations and the right of self-determination for all countries, represented progress in the matter.

The question of the definition of aggression was discussed once again at the full Assembly session in 1967. By means of Resolution 2330(XXII) adopted on December 18, 1967 the General Assembly recognized the widespread conviction of the need to expedite the definition of aggression. After more than a decade, work on the definition of aggression was resumed.

The Special Committee on the Question of Defining Aggression was supposed to present a report to the General Assembly at its 23rd session(1968). The Committee, however, was not able to complete its assignment until 1974. Finally in 1974 the Special Committee presented a report to the General Assembly which contained a Draft of the Definition of Aggression accepted by the Committee. The General Assembly conveyed the draft to the Sixth Committee which recommended adoption to the full Assembly.

The report of the Special Committee was placed on the agenda of the 29th Session of the General Assembly. On December 14, 1974 the General Assembly unanimously adopted the draft, without alteration, at its 2319th meeting by means of Resolution 3314 (XXIX). See Resolutions, adopted by the GA during its 29th session, Vol. I, pp. 142-4.

The question of the legal binding force of General Assembly Resolutions such as this important one, No. 3314 (XXIX) and of Declarations, in particular, whether they can be recognized as a factor in the process of forming customary international law in the interpretation of Article 38, paragraph I b), that is to say as "evidence of a general practice", is a very debatable theme, since the Charter does not grant legislative authority to any organ of the United Nations. It is widely accepted, of course, that the General Assembly does not possess law-giving power. However, many scholars feel that there are circumstances which confer authority on decisions of the General Assembly. Asamoah, for example writes:

"Admittedly, the Assembly is not empowered to legislate but there are certain circumstances when its decisions are authoritative. Moreover, the Assembly is composed of States which are responsible for the creation of international law. The Assembly may act as a forum for agreement on legal principles. Therefore, the circumstances of the adoption of a declaration need careful examination before any opinion on its significance can be given" (Asamoah, The Legal Significance of the Declarations of the General Assembly of the United Nations, p. 24).

According to Sloan:

"There are circumstances under which a resolution of the General Assembly produces important juridical consequences and possesses binding legal force. As a general rule, however, resolutions, for lack of intention or of mandatory power in the Assembly, do not create binding obligations in positive law... Although a large majority supports the view that most recommendations have no legal force, the opinion also prevails that General Assembly recommendations possess moral force and should, as such, exert great influence.

Representatives in describing the effect of General Assembly recommendations have used such phrases as 'moral force', 'moral authority', 'moral weight', 'moral power', 'moral judgement', 'moral obligation', and 'morally binding'..." (See Sloan, The Binding Force of a Recommendation of the General Assembly of the United Nations, loc.cit. pp. 1-33).

D.H.N. Johnson emphasizes the moral and political effect of resolutions: "There is also nothing to prevent members incurring binding legal obligations by the act of voting for resolutions in the General Assembly, provided there is a clear intention to be so bound. Recommendations of the General Assembly... are not in themselves sources of law. Their value, even as means for the determination of rules of international law, depends upon the degree of objectivity surrounding the circumstances in which they were adopted..." (D.H.N. Johnson, The Effect of Resolution of the United Nations, loc.cit. p. 121).

Generally it can be indicated that the Assembly is not vested with legislative powers. Lauterpacht (f.n.41), p. 426 writes: "...the General Assembly is not endowed with effective powers of decision in the fulfillment of the general functions entrusted

If it took until the end of 1974 before the States could agree on a definition of aggression. Certainly in 1938 it was not a belief of the international community that the infiltration of armed bands, one of the most disputed issues in the Special Committee for Defining Aggression, was to be considered aggression according to international law.

This is clear if one compares the first definition proposal, submitted by the Soviet Union, and the corresponding text in the Resolution adopted by the General Assembly in 1974.

In the draft of the U.S.S.R., we read:

1. In an international conflict that State shall be declared the attacker which first commits one of the following acts...f) support of armed bands organized in its own territory which invade the territory of another State, or refusal, on being requested by the invaded State, to take in its own territory any action within its power to deny such bands any aid or protection.²³⁵

The resolution adopted by the General Assembly on December 4, 1974, maintains on the contrary, in Article 3:

to it by the Charter"). However, although the recommendations of the Assembly are not legally binding, they provide an important instrument for bringing the weight of world public opinion to bear upon the Members of the United Nations."

235. UN Doc. GA OR (XII), Suppl. No. 16 (A/3574) pp. 30-1, (A/AC. 77/L.4).

Any of the following acts, regardless of a declaration of war, shall subject to and in accordance with the provisions of Article 2, qualify as an act of aggression:...g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.²³⁶

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236. 3314 (XXIX), Ibid., See further reports of the Special Committee on the Question of Defining Aggression, March 11 - April 12, 1974, UN Doc. GA OR 29th session, Suppl. No. 19 (A/9619), Chairman: Mr. Bengt H.G.A. Bromes (Finland) and UN Doc. A/9890, Report of the Sixth Committee, Rapporteur: Mr. Joseph Sanders (Guyana), December 6, 1974.

Acts of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein (Res. 3314(XXXIX), loc.cit.).

And in Article 7 it is indicated:

Nothing in this definition, and in particular Article 3, could in any way prejudice the right of self-determination, freedom and independence, as derived from the Charter, of people forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned declaration.²³⁷

The definition of aggression, accepted on all sides, proceeds from the belief that subjugated peoples, who are held in subjugation against their will and the right of self-determination, may free themselves and to this end enlist the support of third States.²³⁸

237. Mr. Kolesnic (Union of Soviet Socialist Republic) stressed (in the Special Committee) with regard to article 3...paragraph (g)...(that) there was a certain connexion between that paragraph and article 7. His delegation attached great weight to the fact, that not a single delegation...had expressed opposition to the right of peoples to self-determination (UN Doc. GA OR 29th Session, Suppl. No. 16, A/9619, pp. 36-7).

238. "Das Recht auf freie Entscheidung über den politischen Status, insbesondere auf politische Unabhängigkeit, bedeutet, dass die Völker das Recht haben, ihr Schicksal selbständig oder gemeinsam mit anderen Völkern und Nationen...zu gestalten." See Arzinger, Das Selbstbestimmungsrecht der Gegenwart, p. 229. E.t.: The right to decide freely with regard to political status, in particular political independence means...that the people have the right to construct their own destiny independently or together with other peoples or nations by means of a sovereign State.

The struggle of oppressed peoples for self-determination is centuries old, a struggle which found a good deal of support in world public opinion. The Greek war for independence 1821-1829, the Polish uprising 1830-1831, and the Hungarian rebellion of 1848 found substantial support, for instance. However,

until recently the majority of Western jurists assumed or asserted that the principle had no legal content, being an ill-defined concept of policy and morality.²³⁹

In Germany the right of self-determination had often been discussed as a result of Woodrow Wilson's 14 Points.

239. Brownlie (f.n.44), p. 483.

Münch, in Ostverträge und Neues Jus Cogens, in: Ostverträge, Berlin-Status, Münchener Abkommen, Beziehungen zwischen der BRD und der DDR, Verträge und Diskussionen eines Symposiums, veranstaltet vom Institut für Internationales Recht an der Universität Kiel, 27.-29. März 1971, p. 111-2, writes: "Das Selbstbestimmungsrecht der Völker wird im üblichen Handapparat des Völkerrechtlers noch als blosses politisches Prinzip, nicht als Rechtssatz angesehen. ... Das Schrifttum des Ostblocks vertritt es schon lange als Rechtssatz. Die Praxis der Dekolonialisierung, die Entschliessungen der Vereinten Nationen, besonders 1514 (XV) und die Aufnahme in die Art. 1 der beiden Menschenrechtskonventionen der Vereinten Nationen bestätigen es."

E.t.: The right of self-determination of peoples is still regarded by the scientific international law practice as a political principle and not as a legal prescription. Scholars from the East Block represent it since a long time as a legal principle.... The practice of decolonization, the resolutions of the UN-particularly 1514(XV)- and its inclusion in Article 1 of both Human Rights Conventions of the UN...confirm this view.

These 14 Points and thereby the right of self-determination were supposed to provide the basis for the peace concluded at the end of the First World War.²⁴⁰ It was a political slogan before Hitler came to power and was subsequently used by him to good advantage. The Covenant of the League of Nations did not contain the right of self-determination.

The Charter of the UN mentions in Article 1 and in Article 55 the right of self-determination of peoples and as a consequence the practice of United Nations organs has established the principle as a part of the law of the United Nations.²⁴¹

240. The American President originally intended to incorporate the principles of the right to self-determination in the Charter of the League of Nations. Self-determination was also included in Article III of the Covenant drafted by Wilson. However, he gave up his territorial revisions clause, and it is not known whether other States pressured him into doing this. At any event, Article 10 of the League Charter contains nothing about the principle of self-determination.

241. Article 1 states: The purposes of the United Nations are:....2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; and Article 55 sums up this reference in the following manner: "With a view to the creation of conditions of stability and well-being...based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote..."

In Resolution 637 A (VII) of December 16, 1952 the General Assembly recommended that the members of the UN uphold the principle of self-determination for all peoples and nations. In the Declaration on the Granting of Independence to Colonial Countries and Peoples 1514 (XV) of December 14, 1960, the General Assembly declared that all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The Declaration regards the principle of self-determination as a part of the obligations stemming from the Charter, and is not a 'recommendation', but is in the form of an authoritative interpretation of the Charter. ... However, a number of governments continue to deny that it exists as a legal principle.²⁴²

One is no longer able to dispute the character of the right of self-determination as a genuine legal principle especially since the General Assembly in 1966 adopted Resolution 2189 (XXI) of December 13, 1966 in which it noted with deep regret that six years after the adoption of the Declaration 1514 (XV) of December 1960 many territories were still under colonial domination, and deplored the negative attitude of certain colonial

242. Brownlie (f.n.44), p. 484; see also Fawcett, The New Nations in International Law and Diplomacy, p. 245; Wright, The Role of International Law in the Elimination of War, p. 28.

powers which refused to recognize the right of colonial peoples to self-determination.²⁴³

Furthermore, the General Assembly reaffirmed its recognition of the legitimacy of the struggle of the peoples under colonial rule to exercise the right of self-determination.

The most important and possibly the most decisive step in the realization of the principle of self-determination was taken in the passage of both texts on Human Rights in the Annex to Resolution 2200 (XXI) of December 16, 1966 with the title: 'International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights.'²⁴⁴ In both Covenants Article 1,

243. UN Doc.A/RES/637(VII) A, The right of peoples and nations to self-determination, GA OR (VII), Suppl. No. 20 (2361), p. 26; A/RES/1514(XV), Declaration on the granting of independence to colonial countries and peoples, GA OR (XV), Suppl. No. 16 (A/4684), p. 67; A/RES/2189(XXI), Implementation of the Declaration on the granting of Independence to Colonial Countries and Peoples, GA OR (XXI), Suppl. No. 16 (A/6316), p. 5.

244. Resolutions adopted by the General Assembly, 21st Session GA OR, Suppl. No. 16 (A/6316), pp. 49-60.

sent. 1 expressly states:

All peoples have the right to self-determination.

This then is made more precise in Article 1, paragraph 1, sent. 2 and paragraph 2 of the texts (of both Conventions) with the appeal to the parties to the Covenants to bring about the realization of the right of self-determination in conformity with the provisions of the Charter of the United Nations.²⁴⁵

For Münch the conception of self-determination receives further substance by reason of the authoritative Resolution 242 (1967) of the Security Council on Palestine of November 22, 1967 in which is emphasized

the inadmissibility of the acquisition of territory by war.²⁴⁶

245. With the law of November 15, 1973 (Law Gazette II, p. 1533), the German Parliament approved the International Covenant on Civil and Political Rights with reservations (not taken into account here), and with the law of November 23, 1973 (Law Gazette II, p. 1569) the Parliament approved the International Covenant on Economic, Social and Cultural Rights without reservations (text of the Covenants: pp. 1534-55; 1570-82). Berlin (West): "With the following declaration...: The Convention(s) shall also to apply to Berlin (West) with effect from the date on which (they) enter(s) into force for the Federal Republic of Germany, except as far as Allied rights and responsibilities are affected" (Multilateral Treaties in respect of which the Secretary-General performs depositary functions, List of Signatures, Ratifications, Accessions, etc. as at December 31, 1974, UN Doc. ST/LEG/SER.D/8, pp. 95, 90).

246. Resolutions and Decisions of the Security Council, 1967, SC OR 1967 (XXII), UN Doc. S/INF/22/Rev. 2, p. 8-9.

Münch feels that the offence against the right of self-determination is to be found in the case of Palestine as well as all the former German eastern territories. He maintains that the Security Council would find that indigenous population of Palestine had a right to a referendum.²⁴⁷

This opinion voiced by Münch at the Kiel Symposium in 1971, at which Scheuner and Menzel also participated, remains controversial, however.

In conclusion it can be said that the principle of self-determination has been accepted for some time but not recognized as a legal principle under international law; however, by reason of the UN Charter and the subsequent interpretation of this by the General Assembly, self-determination has become a legal principle under the Charter of the United Nations with the overwhelming support of the Member-States.

But in the year 1938 self-determination was only a political principle²⁴⁸ and it was therefore not a

247. See Ostverträge-Berlin-Status, Münchener Abkommen, Beziehungen zwischen der BRD und der DDR, pp. 112, 153.

248. A telegram circulated by Weizsäcker on October 3, 1938 stated with regard to the Munich Agreement: "Zum ersten Mal in der Geschichte ist es gelungen, auf friedlichem Wege eine Grenzrevision im Sinne des Selbstbestimmungsrechts der Völker zu erreichen" (ADAP, IV, p. 20). E.t.: For the first time in history a boundary revision has been accomplished

repudiation of international law when the Czechoslovak Government addressed simultaneously to the British and French Governments an official note which rejected the suggestion of carrying out a plebiscite in the territories in question and thereafter imposed martial law in the area of the Sudetenland.²⁴⁹

With regard to the activities of Henlein's volunteer corps it can be said that from the standpoint of public international law and the legal statute and definition of aggression one has to assume that at the time of the Munich Agreement no stricter obligations existed for the States than required by Article 3g) of the definition in Resolution 3314 (XXIX), that the formation of bands reached a certain scale.

in a peaceful manner in the spirit of the right of self-determination of nations.

Schwarzenberger writes: "The success of the German move in Austria invited repetition in Czechoslovakia. ...Again the principle of self-determination served as a handy pretext. Whatever merit this principle may possess, Hitler was hardly entitled to base any claim on this product of liberal thinking"...(Power Politics, p. 283).

249. Starke writes (1967): "The right of self-determination of peoples...has been expressly recognised by the United Nations. ...Notwithstanding denials that such a right of self-determination exists, it must be acknowledged that latterly there has been wider general recognition of the right. ...Prior to 1958, it could be said that customary international law conferred no right upon dependant peoples or entitles to statehood, although exceptionally (some) such ad hoc right might be given by treaty."(...Starke (f.n.37), pp. 119-21.)

Just this condition, however, was not met by the Sudeten German "Freikorps", for during the negotiations at that time they were not mentioned once because of the insignificant role they played.

Even if one were to apply today's definition of aggression to the relations at that time, the formation of the "Freikorps" would not have represented an act of aggression. Their actions did not constitute aggression against Czechoslovakia for which the German Reich could be held responsible, and they were not regarded as such by the Powers involved, as the subsequent events demonstrated. The opposing view would maintain that the German Reich had already begun a war of aggression against Czechoslovakia in the second half of September 1938.²⁵⁰ This interpretation, however, is not entertained seriously by anyone.

250. See Kimminich (f.n.110), p. 17.

The French historian Pierre George, however, considers it as proved that already from 1935 onwards there existed a joint "Pan-germanic" campaign waged from Berlin and Nürnberg against the Czechoslovak Government and the State by the Reich and the Sudeten German Party on Henlein (Le Problème allemand en Tchécoslovaquie 1919-1946, pp. 51). He goes on to say: "The course of everyday politics gives the impression of a perfectly organised play in which the roles have been exactly distributed between the Third Reich and the Sudeten German Party. All the young men belonging to the Pan-germanic group and led by men of the Sudeten German Party, came to Germany to undergo military training." (E.t.).

Also Zourek's reference to the Arbitration Agreement made between the German Reich and Czechoslovakia²⁵¹ in accordance with Annex E of the Treaty of Locarno of October 16, 1925²⁵² does not alter this legal position. This was inherently a Non-Aggression Pact which, from the point of view of international law, was on the same footing as the Pact of Paris.

If France, as Zourek further states,²⁵³ neglected its duties as an ally towards Czechoslovakia by urging the latter to enter into the Munich Agreement, then it is a matter which concerned only those countries, though it was suited to provide a ground for the nullity of the Munich Agreement.

Inasmuch as there was a dispute over an arbitration clause, it was up to the parties thereby affected, namely Czechoslovakia, to turn to the Permanent Commission (Article 6 of the Annex E). In its Note of September 20, 1938 to Great Britain and France, Czechoslovakia referred to arbitration, but dropped the matter after Great Britain, in its reply, expressed the view that it was highly unlikely that the German Reich would accept such a proposal.

251. Reference is made to the text (para 2) to f.n.4.

252. Law Gazette 1925 II, pp. 975 (pp. 1003-9).

253. Zourek, Ibid., (f.n.3).

Nevertheless the Nuremberg Military Tribunal under Control Council Law No. 10, stated in the "Ministries Case:"

On 16 October 1925, Germany entered into a treaty with Czechoslovakia Article I of part 1 of which provided that all disputes of any kind between Germany and Czechoslovakia, which may not be possible to settle amicably by normal means of diplomacy, should be submitted for decision either to an arbitral tribunal or to the Permanent Court of International Justice, and it was agreed that the disputes referred to include those mentioned in Article XIII of the Covenant of the League of Nations.²⁵⁴

Spengler writes:

Schwieriger ist...die Frage zu beantworten, ob die Münchner Regelung einen Verstoss gegen den in Locarno abgeschlossenen deutsch-tschechoslowakischen Schiedsvertrag vom 16.10.1925 darstellt.

In diesem Vertrag hatten sich Deutschland und die CSR verpflichtet, alle geeigneten Streiffälle zwischen ihnen entweder einem Schiedsgericht oder dem Ständigen Internationalen Gerichtshof zur Entscheidung vorzulegen (Art. 1). Dabei nahm der Vertrag diejenigen Streiffälle von der Regelung aus, die einer richterlichen oder schiedsrichterlichen Entscheidung nicht zugänglich waren, sowie diejenigen, die aus Tatsachen herrührten, die bereits vor Abschluss des Schiedsvertrages entstanden waren.

Nach Art. 1 konnte eine Entscheidung durch Richterspruch nur verlangt werden, wenn ein Streit über ein Recht vorlag. Darum handelte es sich jedoch im Falle der Sudetenkrise unzweifelhaft nicht, denn die rechtliche Gültigkeit der bis dahin bestehenden deutsch-tschechoslowakischen Grenze wurde von Deutschland nicht in Frage gestellt.

254. "Ministries Case", Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. XIV, p. 325.

Es ging vielmehr um die Durchsetzung der politischen Forderung auf Revision der deutsch-tschechoslowakischen Grenzen.

Während derartige politische Streitfragen gemäss Art. 3, Abs. 3 des Vertrages zwischen Deutschland, Belgien, Frankreich, Grossbritannien und Italien vom 16.10.1925 einer Vergleichskommission zu unterbreiten waren, die bei Nichteinverständnis auch nur einer Streitpartei mit der vorgeschlagenen Regelung die Angelegenheit an den Völkerbundsrat abzugeben hatte, der dann nach Art. 15 VBS tätig wurde, erforderte der deutsch-tschechoslowakische Schiedsvertrag noch eine Art Vorverfahren.

Die hier massgebliche Spezialregelung des Art. 17 ordnete an, dass die ständige Vergleichskommission erst dann um eine Entscheidung ersucht werden durfte, wenn vorher alle diplomatischen Mittel ausgeschöpft wurden (gütliche Lösung auf gewöhnlichem diplomatischem Wege).

Gerade darum handelte es sich aber bei der britisch-französischen Vermittlungsaktion, deren Höhepunkt die Münchner Konferenz war, auf der es gelang, Deutschland im wesentlichen auf die Lösung festzulegen, die die CSR am 21. September 1938 bereits akzeptiert hatte. In diesem Sinne ist auch die positive Bewertung der britisch-französischen-italienischen Vermittlungsaktion und der Münchner Konferenz durch den Völkerbund zu verstehen. 255

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255. Spengler, Zur Frage des völkerrechtlich gültigen Zustandekommens der deutsch-tschechoslowakischen Grenzregelung von 1938, p. 135-6. E.t.: A somewhat more difficult question to answer is whether the Munich settlement represents a violation of the German-Czechoslovak Arbitration Agreement of October 16, 1925 signed at Locarno. ...

In this agreement Germany and the CSR had undertaken to submit for decision all suitable disputes arising between them to the Arbitration Tribunal or the Permanent International Court (Art. 1). Not included in the agreement are disputes which were outside the jurisdiction of a judicial or arbitration decision and those based on facts which took place prior to the signing of the Arbitration Agreement.

According to Article 1 a decision by way of judicial ruling could only be requested if the dispute concerned a right. In the instance of the Sudeten crisis this was certainly not the case, since Germany had not questioned the legal validity of the German-Czechoslovak frontier existing up to that time. At issue, rather, was the imposition of the political demand for the revision of the German-Czechoslovak frontiers.

While according to Article 3, paragraph 3 of the Agreement of October 16, 1925 made between Germany, Belgium, France, Great Britain and Italy such political disputes had to be submitted to an Arbitration Commission - which in case of dissent of just one party to the dispute with the suggested settlement had to forward the matter to the Council of the League of Nations which, in turn, could deal with it under Article 15 of the CLN - the German-Czechoslovak Arbitration Agreement required in addition a kind of preliminary procedure.

The special provision of Article 17 applicable here specified that a decision could be sought only then from the Permanent Arbitration Commission when first all diplomatic possibilities had been exhausted (friendly solution through normal diplomatic channels).

The British-French efforts of mediation represented exactly such a procedure. The culminating point of such efforts was the Munich Conference which succeeded essentially in binding Germany to the solution already accepted by the CSR on September 21, 1938. Also the positive estimation given by the League of Nations to the British-French-Italian efforts of mediation must be seen in this context.

e) The Argument of Conspiracy Against Peace as a
Special Reason for the Nullity of the Agreement

Brownlie writes:

Since the latter half of the nineteenth century it has been generally recognized that there are acts or omissions for which international law imposes criminal responsibility on individuals and for which punishment may be imposed, either by properly empowered international tribunals or by national courts and military tribunals. These tribunals exercise an international jurisdiction by reason of the law applied and the constitution of the tribunal, or, in the case of national courts, by reason of the law applied and the nature of jurisdiction (the exercise of which is justified by international law).²⁵⁶

This possible ground of nullity, which must be exclusively judged by the criteria of Article 6a) of the Charter of the International Military Tribunal in the Annex of the Agreement for the prosecution and punishment of the Major War Criminals of the European Axis of August 8, 1946 which runs as follows:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

a) Crimes against peace: Namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances,

256. Brownlie (f.n.44), p. 454; see further Starke (f.n.37), pp. 58-9; O'Connell (f.n.80), Vol. 2, pp. 817-8; Delbez (f.n.30), p. 398; Lauterpacht (f.n.41), Vol. 1, p. 341-2; Schwarzenberger (f.n.42), Vol. 1 pp. 183-4; Vol. 2 pp. 607-10; Quadri, Diritto Internazionale Pubblico, pp. 421.

or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.²⁵⁷

The International Military Tribunal in Nuremberg established in its Judgement of October 1, 1946, the facts that

...the conference of the November 5, 1937 made it quite plain that the seizure of Czechoslovakia by Germany had been definitely decided upon, ...the only question remaining was the selection of the suitable moment to do it.

Further, that

the discussions between Hitler and the defendant Keitel with regard to "Case Green" (on the April 21, 1938) were showing quite clearly that the preparations for the attack on Czechoslovakia were being fully considered.

Finally, that

Hitler ordered (on the May 28, 1938) that preparations should be made for military action against Czechoslovakia by the October 2, and from then onwards to the plan invade Czechoslovakia was constantly under review;

and that

257. United Nations Treaty Series No. 279. The Agreement was originally signed by the United States, France, the United Kingdom and the Soviet Union, and came into force for those parties upon signature. It was subsequently adhered to, prior to the Nuremberg Trial, by nineteen states: Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay (Mueller-Wise, pp. 227-38). The Agreement is technically still in force (Ibid., p. 227).

on the May 3, 1938 a directive signed by Hitler declared his unalterable decision to smash Czechoslovakia by military action in the near future.²⁵⁸

Basing himself on these findings Zourek draws the conclusion that, as a void international agreement drawn up only in a pseudo-legal form, the Munich Agreement was meant simply to cover up the international crime of the Nazi conspiracy against peace.²⁵⁹

This view must be contradicted inasmuch as the Munich Agreement must in no way be considered a pseudo-legal document.

If Zourek had applied this view to the later Hacha Agreement of March 15, 1939 then one would have accepted this definition despite certain reservation; not so, however, in the case of the Munich Agreement which was concluded in the proper form of an international treaty by the European powers with the consent of Czechoslovakia, and which does not suffer from any defects that could justify such criticism.

The objection raised by Zourek with regard to the legal characterisation of the Munich Agreement must be rejected on the ground that it represents a polemical and factually unjustified attack against the Agreement. As far

258. Nazi Conspiracy and Aggression, Opinion and Judgement, pp. 24-5.

259. Unrichtige Ansichten über das Münchener Abkommen von 1938, p. 45.

as the ground for the nullity referred to by Zourek is concerned, namely the conspiracy against the peace (complot,...conspiration des nazis contre la paix), two equally important questions must be pointed out; firstly, what did the International Military Tribunal of Nuremberg recognise as constituting a conspiracy against the peace on the part of some of the accused, and secondly, what causal connection exists between the Munich Agreement and the latter's anti-peace activities. Although the indictment concerning crimes against the peace had been based strictly on Art. 6a) of the Charter of the International Military Tribunal, the Court came to the conclusion that the conspiracy only applied to the crime of aggressive war.²⁶⁰

Quincy Wright writes in this connection:

The Tribunal found that the conspiracy charge could apply only to the crime of aggressive war, although in the indictment it had been applied to all the offences named in the Charter. The prosecution had treated the final paragraph of Article 6 as an independent crime but the Tribunal held that this paragraph was "designed to establish the responsibility of persons participating in a common plan," that is, it was intended to include accomplices as well as principals in each crime, not to add a crime of conspiracy. Consequently, the Tribunal considered the conspiracy charge on the basis of Article 6, paragraph (a), which makes "participation in a common plan or conspiracy for the accomplishment" of aggressive war a crime. This

260. Das Urteil von Nürnberg, p. 96.

crime, however, differs little from "planning and preparation" of aggressive war. The evidence showed that concrete plans to make aggressive war were made as early as November 5, 1937. Consequently persons aware of and aiding in these plans after that date were guilty of the conspiracy charge. The prosecution's theory that "any significant participation in the affairs of the Nazi party or government is evidence of a participation in a conspiracy that is in itself criminal" was rejected.²⁶¹

This means, then, that the Court took not even the occupation of the Sudetenland by the German Reich to be the actual criminal act against the peace, and that it found those persons guilty who had personally partaken in a complete plan of aggression against Czechoslovakia, and, further, that the Court certainly did not consider any other event that occurred prior to October 1, 1938 - especially the signing of the Munich Agreement - as an act against the peace which could provide the basis for an ex tunc nullity of the Agreement.

Though published before the Nuremberg Judgment was delivered, Control Council Law No. 10 of December 20, 1945 and Count One of the indictments thereunder (e.g. the indictments in U.S. v. Weiszäcker (Ministries Case, Vol. XII, p. 20) and U.S. v. Krauch (I.G. Farben Case, Vol. VII, p. 14), provided consequently for the punishment of participation in planning, preparing, or initiating the

261. Wright, The law of the Nuremberg Trial, loc.cit. p. 272.

invasions of ...the Sudetenland, and the remainder of Czechoslovakia in March 1939 as crimes against peace and not merely as part of the conspiracy.²⁶²

Strupp-Schlochauer states:

Als Rechtsgrundlage für die in Deutschland von den einzelnen Besatzungsmächten durchzuführenden Kriegsverbrecherprozesse wurde das Kontrollratsgesetz Nr. 10 vom 20.12.1945... erlassen, das dem Statut des Internationalen Militärgerichtshofs nachgebildet ist, aber... bemerkenswerte Abweichungen enthält: in den Tatbestand des Verbrechens gegen den Frieden wurden nunmehr auch "Einfälle"²⁶³ (in andere Länder) einbezogen, um die Annexionen Österreichs und der Tschechoslowakei bestrafen zu können. ...²⁶⁴

In both cases the defendants were accused of having misused their standing and positions in the economy, finance and industry until the end of the war by participating in the initiation of invasions of other countries and in wars of aggression in violation of international laws and treaties, including but not limited

262. Brownlie, (f.n.217) p. 211-2; Text of the law: J.O.F. 1945, pp. 84-8. German translation in v. Knierim, Nürnberg, Rechtliche und menschliche Probleme, p. 551-4.

263. French: "Déclenchement d'invasion".

264. Strupp-Schlochauer (f.n.40), Bd. 2, p. 640. E.t.: Law No. 10 of December 20, 1945...passed by the Control Council was used as the legal basis for the War Crimes Trials which were to be staged by each occupying Power. This law was fashioned after the Statute of the International Military Court, but contains notable differences: the crimes against the peace now included "invasions" (of other countries) in order to make the annexation of Austria and Czechoslovakia a punishable offence.

to planning, preparation, initiation and waging of wars of aggression, and wars in violation of international treaties, agreements, and assurances, and specifically in the case of Czechoslovakia, beginning with the invasion of October 1, 1938.²⁶⁵ The Court concurred with this when bringing in a verdict of 'guilty'. Thus, it is the occupation of the Sudeten territories on October 1, 1938 that becomes the centrepiece of the indictment and the subject of the judgement, and not the Munich Agreement itself which, as far as the Court was concerned, had been of no great importance to the issue of conspiracy against the peace.²⁶⁶

But in the case U.S. v. Krauch the Judgement states that:

To depart from the concept that only major war criminals - that is, those persons in the political, military and industrial fields, for example, who were responsible for the formulation and execution of policies - may be held liable for waging wars of aggression would lead far afield...

265. "IG Farben Case", Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No. 10, Vol. VIII p. 1096: "All the defendants acting through the instrumentality of Farben and otherwise...participated in the planning, preparation, initiating, and waging of wars of aggression and invasions of other countries... 2. The invasions and wars of aggression were as follows...against Czechoslovakia, October 1, 1938 and March 15, 1939..."

266. Ibid., Vol. VII, pp. 14-5; Vol. XII pp. 20-1; Vol. XIV pp. 323-5, 865.

The defendants now before us were neither high public officials in the civil government nor high military officers. Their participation was that of followers and not leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw a line between the guilty and the innocent among the great mass of German people.²⁶⁷

In the further question of a causal connection between the Munich Agreement and crimes against the peace is indisputable, that the International Military Tribunal has doubtlessly elaborated the pre-conditions of a systematic aggressive scheme against Czechoslovakia. The "Case Green" document, too, contains such a multitude of detailed facts and military data that one is led to the conclusion that in the Munich Agreement the conspiracy against the peace suffered only the temporary setback of a predetermined future course of events,²⁶⁸ thereby becoming part of the actual act of aggression.

This, however, must be contradicted, since such a causal connection which is supposed to represent the basis of the important ex tunc nullity ground, does not exist.

It is thus the problem of causality which is of prime importance in this issue and which must give an affirmative answer to the question - if Zourek would be right: that it

267. Brownlie (f.n.262), p. 204-5.

268. Strupp-Schlochauer (f.n.40), Bd. 2, p. 555 point out that soon the Munich Agreement ceased to being a means of saving and stabilising European peace, and became a short-term means of stopping Hitler's strive for expansion.

was the Munich Agreement itself and not its accompanying factors, particularly the occupation of the Sudeten territories on October 1, 1938, which contributed to the conspiracy against the peace. In international law not enough importance is attached to the question of causality. The German jurist Bothe mentions this in connection with the Law of Treaties, and draws a very appropriate comparison between coercion when concluding a treaty, and a success that goes counter to international law.

He writes:

Attention must further be drawn to a problem of causality which was generally overlooked in the debates concerning art. 49. When is the conclusion of a treaty "procured" by the threat or use of force? Is any conclusion "procured" by coercion for which the use or threat of force constitutes a cause, i.e., any conclusion which would not have occurred if there had not been a use or threat of force? It is clear that a treaty comes under the rule of art. 49 if the coercion is directly intended to bring about the treaty, e.g., if a treaty is concluded by a State giving way to the threat that force will be exercised against it if it does not consent to the proposed treaty. But if a treaty is concluded between two States to clear up a situation brought about by the illegal use of force of one of them, it is not obvious that such a treaty is "procured" by coercion although the coercion is a cause of the treaty, i.e., although the treaty would not have occurred without that coercion. This treaty may be fair regulation of the tension existing between the States, which does not leave the aggressor any unjust advantage. In this case it is difficult to see why the treaty should be void. On the other hand, the treaty may be aimed at reserving to an aggressor the fruits of his illegal attack. In this case, it seems to be just to consider the treaty as void. A solution of this problem must be found in a reasonable and restrictive interpretation of the word "procure", which

interpretation may tentatively be circumscribed as follows: A treaty is only procured by coercion if the use or threat of force is directly intended to bring about the treaty or if the treaty is aimed at maintaining a situation which was created by an illegal use of force. But it seems to be extremely difficult, if not impossible, to formulate a really precise and satisfactory solution to this problem of causality.²⁶⁹

In consequence of the foregoing considerations the conclusion is justified that in any case the Munich Agreement does not constitute, even in the opinion of the judges at Nuremberg, part of Hitler's plan against Czechoslovakia, but an interruption of his plans not foreseen by Hitler and occasioned by the interference of the Franco-British statesmen.²⁷⁰

"Case Green" relates to Hitler's plan for military aggression against Czechoslovakia. Indisputably, the plan consisted in using an incident in Czechoslovakia as the pretext for military action to exterminate her. Hitler's behaviour during the negotiations with Mr. Chamberlain in Berchtesgaden and Godesberg indicates that he had decided to realize his plan of a military action against Czechoslovakia with the aim of completely destroying the State.

It is entirely due to the efforts of the British Prime Minister that the realization of this plan was

269. Bothe, Consequences of the Prohibition of the Use of Force, *Loc. cit.* p. 513.

270. Nazi Conspiracy and Aggression, Opinion and Judgement, p. 25-7.

delayed for a period of half a year. According to Schacht's testimony before the International Military Tribunal of Nuremberg, Hitler said of Prime Minister Chamberlain, he had delayed his march into Prague.²⁷¹

The Munich Agreement was not part of the war plans of the Reich but represents a temporary deviation from them. In fact, the Nuremberg Judgement determined that Hitler's plans must have been altered in September 1938 after the Conference of Munich.²⁷² It was not until the Spring of 1939 that Hitler was able to realize his plans.²⁷³

271. International Military Tribunal, Vol. XII, p. 580; Kimminich, loc.cit. p. 14 f.n.13.

272. Das Urteil von Nürnberg, p. 53.

273. Under General Assembly resolution 177(II) of November 21, 1947 paragraph (a), the International Law Commission was directed to "formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal".

In pursuance of this resolution of the General Assembly, the Commission undertook a preliminary consideration of the subject at its first session. In the course of this consideration the question arose as to whether or not the Commission should ascertain to what extent the principles contained in the Charter and judgement constituted principles of international law. The conclusion was that since the Nürnberg principles had been affirmed by the General Assembly, the task entrusted to the Commission by paragraph (a) of resolution 177(II) was not to express any appreciation of these principles as principles of international law but merely to formulate them. This conclusion was set forth in paragraph 26 of the Report of the Commission on its first session, which Report was approved by the General Assembly in 1949. Mr. Jean Spiropoulos was appointed Special Rapporteur to continue the work of the Commission on the subject and to present a Report at its second session.

At the session under review, Mr. Spiropoulos presented his Report (A/CN.4/22) which the Commission considered at its 44th to 49th and 54th meetings. On the basis of this Report, the Commission adopted a formulation of the principles of international law which were recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal. ... (UN Doc.A/1316, loc.cit. p. 13).

The formulation of principle VI by the Commission was:

The crimes hereinafter set out are punishable as crimes under international law:

a. Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

The Report included the following comment to this principle VI:

"The Tribunal made a general statement to the effect that its Charter was "the expression of international law existing at the time of its creation".

... The Charter of the Nürnberg Tribunal did not contain any definition of "war of aggression", nor was there any such definition in the judgement of the Tribunal. It was by reviewing the historical events before and during the war that it found that certain of the defendants planned and waged aggressive wars against twelve nations and were therefore guilty of a series of crimes. ...

The terms "planning" and "preparation" of a war of aggression were considered by the Tribunal as comprising all the stages in the bringing about of a war of aggression from the planning to the actual initiation of the war. In view of that, the Tribunal did not make any clear distinction between planning and preparation. As stated in the judgement, "planning and preparation are essential to the making of war".

...

The meaning of the expression "waging of a war of aggression" was discussed in the Commission during the consideration of the definition of "crimes against peace". ...

A legal notion of the Charter to which the defence objected was the one concerning "conspiracy". The Tribunal recognized that "conspiracy is not defined in the Charter". However, it stated the meaning of the term, though only in a restricted way. "But in the opinion of the Tribunal", it was said in the judgement, "the conspiracy must be clearly outlined in its criminal purpose. ..."

The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan" (loc.cit. pp. 13-4).

On July 28, 1954 the International Law Commission adopted a Draft Code of Offences against the Peace and Security of Mankind (UN Doc. GA (OR), IX, Suppl.9 (A/2692), pp. 11-2).

The respective provisions (Article 2 of the draft) run as follows:

The following acts are offences against the peace:

... (1) Any act of aggression, including the employment of armed force by the authorities of a State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

(2) Any threat by the authorities of a State to resort to an act of aggression against another State.

(3) The preparation by the authorities of a State of the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

(4) The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.

(5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized

activities calculated to foment civil strife in another State.

(6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.

(7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character.

(8) The annexation by the authorities of a State of territory belonging to another State, by means of acts contrary to international law.

(9) The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind. ...

(13) Acts which constitute:

(i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or

(ii) Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or

(iii) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article; or

(iv) Attempts to commit any of the offences defined in the preceding paragraphs of this article.

f) The Objection of Fraud²⁷⁴

When Hitler annexed Czechoslovakia after promising to guarantee her existence,²⁷⁵ he incurred the reproach of fraud in concluding the treaty because even at the time of its conclusion Germany did not intend to observe it.²⁷⁶

As with contracts in private law, error and fraud also appear in international law though in this sphere they are much less common. Fraud, for example, is almost unknown in international law.²⁷⁷

274. The International Law Commission gave the following comment to draft Article 46 of the Convention on the Law of Treaties (Art. 49 of the Convention): "Fraud is a concept found in most systems of law, but the scope of the concept is not the same in all systems. In international law, the paucity of precedents means that there is little guidance to be found either in practice or in the jurisprudence of international tribunals as to the scope to be given to the concept. In these circumstances, the Commission considered whether it should attempt to define fraud in the law of treaties. The Commission concluded, however, that it would suffice to formulate the general concept of fraud applicable in the law of treaties and to leave its precise scope to be worked out in practice and in the decisions of international tribunals" (UN Doc. A/CONF.39/11/Add. 2, p. 64).

275. Document No. 6 (Annex to the Agreement).

276. Ort, in Kimminich (f.n.110), p. 76.

277. Oraison, Le dol dans la conclusion des traités, end.c. p. 619; Guggenheim (f.n.27), Bd. 1 p. 84, 86. "Examples of fraud as a ground for vitiating consent to be bound by a treaty are rare, if not non-existent, in States practice.... The (International Law) Commission in their commentary to Article 49 were unable to cite a single instance of fraud. ..." (Sinclair (f.n.35), p. 93).

The Convention on the Law of Treaties deals with error and fraud in articles 48 and 49 without defining them.²⁷⁸

As to what constitutes error in the sense of a vice du consentement in the making of treaties, writers on international law are not entirely in agreement.²⁷⁹

With regard to fraud it is said:

Certain of the rules of municipal law as to what constitutes fraud in the making of contracts would seem to be, in the main, applicable in the case of treaties (induces) as a result of fraud.²⁸⁰

We remember that the corresponding Article 31 of the Harvard Research did also not give a definition of "fraud". In the comment is stated:

Article 31 does not attempt to define the term "fraud" or indicate in any way the essential elements which give an act a fraudulent character. Under this article that task is left to the international tribunal or authority before which the party alleging the employment of fraud must bring the question in order to obtain a declaration of nullity. There is, however, a general agreement among jurists as to the essential characteristics of fraudulent conduct. It may be said that its distinguishing characteristic is that the act was done with a wilful intent to deceive another.

Certain of the rules of municipal law as to what constitutes fraud in the making of contracts would seem to be, in the main, applicable in the case of treaties induced as a result of fraud.

278. UN Doc. A/CONF.39/11/Add. 2, p. 295-6.

279. Harvard Draft Convention on the Law of Treaties, loc.cit. p. 1129.

280. Ibid., p. 1145.

One of these rules is that while wilful misrepresentation, that is, statements made with the knowledge that they are false, and made for the purpose of deceiving another and of inducing him to enter into a contract, always constitutes fraud, innocent misrepresentation, that is, a misstatement of facts not known to be false, is not. The former is always sufficient reason for the avoidance of a contract; the latter may vitiate a contract when the misrepresentation is material or important but it never constitutes ground for an action ex delicto. In fact it is really error and not fraud.²⁸¹

According to a decision handed down by the Supreme Court of Germany (RG), the intention of a contracting party not to observe a treaty does also in the field of public law not invalidate the treaty.²⁸² This is, as well, a generally accepted principle of law. The Permanent Court of International Justice has decided that one party's misinterpretation of the further intentions of the other party does not affect the validity of the treaty.²⁸³ This is also applicable if one contracting party secretly

281. Ibid., p. 1145.

282. RGZ Bd. 147 p. 36 (40).

283. P.C.I.J., Ser. A/B No. 53 (Legal Status of Eastern Greenland), p. 71: "Norway has objected that the Danish Government's intention to extend the monopoly régime to the whole of Greenland was not mentioned in the Danish request of July 14th, 1919, as is alleged to have been done at a later date in the communications addressed to the interested Powers in 1920 and 1921; and it is argued that if the Norwegian Government had been warned of this intention, the declaration of the Minister for Foreign Affairs would have been in the negative; and that, in consequence, the declaration, though unconditional and definitive in form, cannot be relied on against Norway.

The Court cannot admit this objection."

decides not to observe the treaty. This does not entail fraud but a mental reservation which does not affect the validity of the treaty.

Dahm writes:

...der geheime Vorbehalt (ist) auch im Völkerrecht nicht zu beachten. Wenn z. B. ein Staat ein Gebiet für einen längeren Zeitraum mit dem Hintergedanken in Pacht nimmt, es nach dem Ablauf der Pachtzeit für sich zu behalten, so ist gleichwohl der Pachtvertrag zustandgekommen. ...Wenn eine Partei bewusst etwas anderes erklärt, als sie will, so muss sie sich auch beim Wort nehmen lassen.²⁸⁴

It does not come within the scope of mental reservation, when the Judgement of the International Military Tribunal in Nuremberg states:

That Hitler never intended to adhere to the Munich Agreement is shown by the fact that a little later he asked the defendant Keitel for information with regard to the military force which in his opinion would be required to break all Czech resistance in Bohemia and Moravia.²⁸⁵

In ancient times contracting States always tried to defend themselves against intentional breaking of treaties by ceremoniously confirming the treaties with an oath or by the exchange of hostages. In modern times

284. Dahm (f.n.28), Bd. 3 p. 38.

E.t.: ...the 'hidden' proviso (must) be ignored also in international law. When, for example, a State takes out a leasehold interest in a territory for a longer period of time with the intention at the back of its mind of keeping it even after expiration of the lease, a lease has nevertheless been concluded. ...If a party intentionally makes a statement which is at variance with its true intentions, then that statement must be taken at its face value.

285. Nazi Conspiracy and Aggression, p. 27.

the occupation of territory (e.g. in the Treaties of Versailles of 1871 and 1919), pledges (in the Dawes Agreement of 1924) or guarantees by third powers were used for this purpose.²⁸⁶ In any case the mental reservation not to observe the treaty is not taken into account.

Hitler's intention to break the Munich Agreement is shown by his failure to guarantee the existence of Czechoslovakia.

The Annex to the Munich Agreement was signed by the four Conference Powers. The acceptance of the results of the Munich Conference by Czechoslovakia was obviously extended to the Annex as well, particularly because this benefited Czechoslovakia and Czechoslovakia did not exclude any part of the conference results in its acceptance of its terms. The formal requisites of a treaty were therefore met. Whether and what kind of contractual obligations were incurred by reason of the Annex depends entirely on the interpretation of its contents.

According to Paragraph 6 of the proposals of September 19, 1938 the British and French Governments offered to give the Czechoslovak Government in the event of the cession of the predominantly German

286. Lauterpacht (f.n.41), Vol. I pp. 930-32.

territories to Germany, a general guarantee against an unprovoked attack in place of France's still existing treaty commitment to Czechoslovakia. This offer was confirmed in the Annex to the Munich Agreement. Under no circumstances can the interpretation be drawn from this wording that a guarantee had already been given.

Taborsky however thinks that there would be a non-fulfillment of a pledge of guarantee. He explains:

The Anglo-French proposals of 19th September, 1939, have already referred in Point 6 to the safeguarding of Czechoslovakia by a common pledge of guarantee against any unprovoked aggression. ...

The Czechoslovak Government accepted the Anglo-French proposals expressly emphasizing the fact that it accepted them as a whole from which the principle of guarantee must not be detached. In acknowledging the Munich Agreement it accepted the offer of a guarantee by Great Britain, France, Germany and Italy, and at that moment the obligation undoubtedly fell upon all four States to guarantee the new Czechoslovak frontiers: upon Great Britain and France immediately, upon Germany and Italy after the conclusion of the Vienna Arbitration, by which the question of the Hungarian minority (that of the Polish had already been resolved earlier) was definitely decided. ...

All the conditions for carrying out the guarantee were fulfilled by at the latest, shall we say, the end of 1938, and this fact was emphasized by the Czechoslovak Government not only to the Western Powers but also to Germany. ...

Germany's hesitation did not free the other signatories of the Agreement from their obligations. The German refusal to provide the promised guarantee to Czechoslovakia did not, of course, free the other signatories of the Agreement. ...The non-fulfillment of "Munich" gave Czechoslovakia the right of cancellation. ...

There is no doubt that the promise of a guarantee was...an essential. The Anglo-French proposals of 19th September, 1938, were certainly accepted by the Czechoslovak Government with an express declaration of the fact that they were accepted as a whole, from which the principle of guarantee must not be detached. That in accepting these proposals, as well as the Munich Agreement which replaced and supplemented them, the Czechoslovak Government had chiefly in mind (and therefore considered as an essential) the promise of a guarantee is evident also from other "Munich" documents, particular from the reply....regarding the Godesberg Memorandum.²⁸⁷

Blumenwitz states in this connection:

Als ein...auch theoretisch schwer lösbares Problem erscheint die Nichterfüllung des Münchner Abkommens im weiteren Sinne durch das Deutsche Reich und die sich hieraus für die Gebietsübertragung im Herbst 1938 ergebenden rechtlichen Konsequenzen. Im Vordergrund steht hierbei die Nichterfüllung der Garantiezusage. ...Verstöße gegen die im Herbst getroffenen Vereinbarungen sind heute in ihren wesentlichen Punkten unbestritten. Strittig erscheint in erster Linie, ob die im Annex zum Münchner Abkommen enthaltene Garantiezusage mit der Grenzregelung selbst in einem inneren Zusammenhang steht. ...Das Nürnberger Militärtribunal nahm...aufgrund des ihm vorliegenden Aktenmaterials deutscherseits eine arglistige Täuschung an, da die deutsche Regierung von vornherein nicht daran gedacht habe, das in der 1. Zusatzerklärung zum Münchner Abkommen angekündigte Garantieverprechen bezüglich der neuen Grenzen der Tschechoslowakei einzulösen. Objektiv betrachtet, dürfte jedoch der Nachweis eines dolus malus im hierfür allein entscheidenden Zeitpunkt des Vertragsschlusses sehr schwerfallen, so dass das Nichterfüllen der Garantiezusage wohl eher im Zusammenhang mit der Nichterfüllung des Münchner Abkommens durch das Deutsche Reich zu sehen ist.²⁸⁸

287. Taborsky (f.n.206), pp. 33-5.

288. Blumenwitz, Zur Nichtigkeit des Münchener Abkommens vom 29. September 1938, loc.cit. p. 82, 86. E.t.:

The non-fulfillment in the wider sense of the Munich Agreement on the part of the German Reich and the legal consequences ensuing therefrom for the territorial transfer in the autumn of 1938 appears to be a problem whose solution is difficult to achieve even theoretically. In this connection, the non-fulfillment of the promise of guarantee assumes a prime position...

There is no dispute today regarding the main points of the violations of the accords arrived at in the autumn. There is disagreement, however, on whether the promise of guarantee contained in the annex to the Munich Agreement is related internally with the border settlement...

On the basis of the evidence at its disposal, the Nuremberg Military Tribunal took the view that Germany had committed a fraudulent deception, since right from the beginning the German Government had not had the intention of keeping its promise of guarantee relating to the new Czechoslovak frontiers contained in the first supplementary statement to the Munich Agreement. Looking at it objectively, though, it should be extremely difficult to prove the existence of a dolus malus at the time the agreement was concluded - which in this case represents the decisive factor. Thus, the non-fulfillment of the promise of guarantee must surely be looked at in connection with the non-fulfillment of the Munich Agreement on the part of the German Reich.

However, one must contradict Blumenwitz because the Nuremberg Judgement does not contain expressis verbis such a reservation. A fraudulent deception of the contractual parties should be assumed in connection with the failure to make a statement of guarantee. Blumenwitz also fails to give a corresponding citation from the judgement.

Spangler explains:

Zur Begründung der These, dass die Nichterfüllung der Garantiezusagen auf das rechtswirksame Zustandekommen der Grenzneuregelung ohne Einfluss gewesen sei, wird vor allem auf die von den übrigen Münchner Vereinbarungen gesonderte schriftliche Niederlegung in einem Annex zum Münchner Abkommen hingewiesen.

Hieraus - und aus der Tatsache, dass die Zusatzvereinbarung ebenso wie der eigentliche Vertragstext und die drei weiteren Annexe jeweils von allen vier Regierungschefs gesondert unterzeichnet und mit Orts- und Datumsangaben versehen wurden, wird gefolgert, dass nach dem Willen der Unterzeichner die Gebietsabtretung als solche eine in sich geschlossene Abmachung darstellen sollte und auch die aufschiebend bedingte deutsche Garantiezusage nicht etwa als Gegenleistung Deutschlands aufzufassen sei. Anders sei jedoch die Garantiezusage Grossbritanniens und Frankreichs zu beurteilen, da die CSR ihre Einverständniserklärung vom 21. September 1938 nur unter der Voraussetzung gegeben habe, dass Grossbritannien und Frankreich den Fortbestand der CSR als Völkerrechtssubjekt garantierten.

Diese Bedingung habe aber Deutschland nicht binden können, da das anglo-französische Garantie-Angebot bereits vor der Münchner Zusammenkunft an die tschechoslowakische Regierung gerichtet gewesen sei.

Für die hier erörterte Auffassung könnte ausser der äusserlichen Trennung des Zusatzabkommens vom eigentlichen Münchner Abkommen und der gesonderten Unterzeichnung auch das Argument angeführt werden, dass man sich anderenfalls wohl auf eine Garantie seitens Deutschlands

beschränkt hätte; denn die übrigen Garantieversprechen hätten ohnehin nie Gegenleistung sein können. ...289

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289. Spengler (f.n.255), pp. 152-3. E.t.: To support the thesis that the non-fulfillment of the promise of guarantee had no effect on the legally valid formation of the new frontier settlement, reference is made above all to the note contained in the annex to the Munich Agreement but which was written on a separate occasion from the Munich accord.

From this and from the fact that the four Heads of Government affixed their signature, date and place in each case independently to the supplementary agreement as well as to the actual text of the agreement and to the three additional annexes one can conclude that the signatories intended the territorial cession to represent a separate agreement, and the German promise of guarantee not to be taken as Germany's performance. The guarantee pledge given by Great Britain and France, though, must be judged differently, because the CSR made its declaration of consent of September 21, 1938 solely on the condition that Great Britain and France guaranteed the continued existence of the CSR as an international law subject.

This condition, though, could not have been binding on Germany, because the Anglo-French offer of guarantee was tendered to the Czechoslovak Government prior to the Munich conference.

As a further argument to support the view expressed here, apart from the physical separation of the supplementary accord from the actual Munich Agreement and the separate signing, one could mention that, alternatively, one would have restricted oneself to the guarantee on the part of Germany, since the other guarantee pledges could, in any case, never have represented a performance. ...

The legal situation was on September 19, 1938 as follows:

The status of the potential guarantee could have been no higher than that of an offer, since it had not been determined whether Czechoslovakia would accept the Anglo-French suggestions with regard to the cession of territory. The British Government did not have any reason to grant such a guarantee at this time, for the most part because they did not have any treaty commitments to Czechoslovakia, and because they concerned themselves, in this crisis, with avoiding involvement in war. If it was clearly a question of an offer on September 19, 1938, then the arrangement in the Annex to the Munich Agreement that Great Britain and France stand by the offer of that date; more to construe than an "offer" is perfectly understandable; the other questions arise in reference to the legal nature of this offer.

In international law there is an "offer" in the juridical sense which may take on the character of a contract if a declaration of acceptance is made by the nation addressed.²⁹⁰ As in private law, however, it must be a clear and complete treaty proposal, which by means of a declaration of acceptance of the other party leads

290. Suy, Les actes juridiques unilatéraux en droit international public, p. 30; Pfluger, Die einseitigen Rechtsgeschäfte im Völkerrecht, pp. 105.

to the intended legal transaction, for the Czechoslovak Government did not declare anything more than its simple acceptance.

However, if one examines the wording of the offer of September 19, 1938 and that of the Annex, it follows that neither the literal sense nor the conditions indicate that this was a question of a guarantee obligation which could become effective simply through the declaration of acceptance of the Czechoslovak Government.

In the suggestion of September 19, 1938 the point was that both Great Britain and France wanted to join in a guarantee as a means of replacing the treaties which contained reciprocal military obligations. A prerequisite was that other States also gave guarantees which could be acceded to: it was a further condition that the treaties providing for military obligations would be replaced, a development which could only occur by means of a formal agreement.

To begin with, it cannot be assumed that Germany and Italy wanted to undertake such an obligation, although Great Britain and France did not commit themselves to the guarantee. The wording of paragraph 2 of the Annex clearly indicates that in Munich a guarantee by Germany and Italy was still not declared, for it clearly says that the guarantee would be given only after the question of the Polish and Hungarian minorities had been solved.

What kind of guarantee it was supposed to be is not mentioned at all. Therefore there does not exist any ascertainable implication of a future German-Italian guarantee. If reference is made to paragraph 1 of the Annex because of the implication of the intended guarantee, account has to be taken of the non-obligatory character of this paragraph as well.

It became evident that no-one perceived the declarations in the Annex as a binding guarantee by reason of the negotiations which were conducted in the beginning of 1939 between the Conference Powers. As the French Ambassador in Prague reported on February 7, 1939 to the French Government:

Le Ministre des Affaires Etrangères m'a rappelé que le Gouvernement tchécoslovaque attendait que les Puissances de Munich précisent les conditions dans lesquelles elles envisageaient de donner la garantie internationale dont la France et l'Angleterre avaient parlé dès le mois de septembre.²⁹¹

The French Embassy in Berlin directed to the German Foreign Minister on February 8, 1939 a Note Verbale with the following content:

291. Toynbee, loc.cit. pp. 41-2. E.t.: The Foreign Minister reminded me that the Czechoslovak Government expects the Munich powers to indicate the conditions under which they propose to give the international guarantee which France and England have spoken about since September.

Aux termes de l'annexe no.1 à l'accord signé à Munich le 29 septembre 1938, les Gouvernements allemand et italien se sont déclarés disposés à s'associer à une garantie internationale des nouvelles frontières de l'Etat tchécoslovaque contre toute agression non provoquée, lorsqu'aurait été réglée la question des minorités polonaise et hongroise en Tchécoslovaquie.

Se référant à cette déclaration, ainsi qu'aux indications récemment données à Rome par M. Mussolini au Premier Ministre britannique quant aux conditions préalables auxquelles le Gouvernement italien subordonnerait, en ce qui le concerne, la prise en considération de l'octroi de cette garantie, le Gouvernement français, soucieux de donner une suite effective à toutes les dispositions de l'accord de Munich, attacherait du prix à connaître les vues du Gouvernement du Reich sur la question de la garantie visée par ledit accord.²⁹²

In the response of the German Foreign Ministry of February 28, 1939 the Reich Government declared that before the guarantee could take effect they would need

292. Ibid., pp. 42-3. E.t.: According to the wording of the wordings of the Annex No. 1 to the Agreement of Munich of September 29, 1938, the German and Italian Governments declared themselves prepared to join an international guarantee of the new boundaries of Czechoslovakia against any unprovoked aggression, if the question of the Polish and Hungarian minorities in Czechoslovakia had been settled. In reference to this declaration and the notice which Sig. Mussolini recently gave to the British Prime Minister in Rome in relation to the conditions under which the Italian Government would undertake this guarantee, the French Government, concerned as it is to realize all the arrangements of the Munich Agreement, would appreciate it if the Reich's Government made known its position with regard to this guarantee.

to await a clearing-up of the domestic situation in Czechoslovakia, since Poland and Hungary still had differences with Czechoslovakia.²⁹³

Thus it follows all the Conference Powers and Czechoslovakia, in terms of interpretation of the Annex, were of the view that through the signing of the Annex and its acceptance by Czechoslovakia a guarantee still had not been produced and that a further agreement over the conditions under which such a guarantee would be realized in the future would have to be consummated.

Whether one wants to perceive in the Annex a mere declaration of political intention without binding legal effect, or a legally binding provisional agreement which obligated the treaty powers to conclude a guarantee treaty, is not important for the significance of the question of guarantee. The Conference Powers, as the above-mentioned documents indicate, negotiated over the granting of the guarantee: none of the powers refused to grant this: none, however, had done this by March 15, 1939, because the negotiations had not yet been concluded.

Thus up to March 15, 1939 there was no violation of obligations ascribed to the Annex to the Agreement. At the same time, the documents cited clearly indicate that

293. Ibid., pp. 43-6.

the entire Munich Agreement was treated as valid by all the signatory powers and Czechoslovakia.²⁹⁴

The objection of fraud is therefore eliminated as a reason for the nullity of the Munich Agreement "from the beginning."

g) Closing Remarks

Completed actions play a great role in international law.²⁹⁵ While the Stimson Doctrine stems from the rule ex inuria ius non oritur,²⁹⁶ the principle of effectiveness has its origins in the rule ex factis ius oritur.

294. In the "Ministries Case" the Nuremberg Military Tribunal finds obviously - but not convincingly - fraud in the following passage: "Germany's possession of the Sudetenland was the result of an international agreement. That Hitler had not the intention to abide by it and that his assurance to England, France, and Czechoslovakia that this was the end of his territorial aims were false, there can be no doubts" (Vol. XIV p. 343).

295. Seidl-Hohenveldern writes: "In seinem Bestreben, das Zusammenleben der Völkerrechtssubjekte auf eine realistische Basis zu stellen, misst das Völkerrecht der "normativen Kraft des Faktischen" grössere Bedeutung bei, als das innerstaatliche Recht" (f.n.80, p. 305). E.t.: In its efforts to place the co-existence of the subjects of international law on a more realistic basis, international law attributes greater significance to the "normative power of the component parts" than domestic law. See also Bilfinger, Vollendete Tatsachen und Völkerrecht, Z.f.aus.öffentl. R.u.VR., Bd. 15 (1953/54) pp. 453, 477-81.

296. Tucker, The Principle of Effectiveness in International Law, loc.cit. p. 35.

Mac Gibbon explains:

Acquiescence operates in the sphere to which the maxim ex injuria jus non oritur is least applicable, that is where the vindication of a claim or course of action depends on the consent of the States affected. The presumption of consent which may be raised by silence is strengthened in proportion to the length of the period during which the silence is maintained ... Acquiescence is restrictively interpreted.²⁹⁷

Schwarzenberger confines acquiescence to a special type of unilateral act:

(Other) types of unilateral acts... of hardly less general significance (as e.g. recognition and reservation) are...acquiescence. Tacit consent cannot be presumed. Thus, acquiescence may be inferred only if, in good faith, any other interpretation of silence is impossible.²⁹⁸

The history and development of international law have shown that neither of these two principles (Stimson Doctrine and acquiescence) has been given complete effect in international life. A complete realization of the first principle back to the origins of every subject of international law would have as a consequence irreparable confusion and the abrogation of all foundations of law. On the other hand an unrestricted realization of the second principle would contribute to the destruction

297. Mac Gibbon, The Scope of acquiescence in International Law, loc.cit. p. 143.

298. Schwarzenberger (f.n.42), Vol. 1 p. 160.

of international law, because then States would need only to effect faits accomplis²⁹⁹ in order to have their actions acquire legal justification if the parties affected by the fait accompli failed to react. Therefore it is necessary for the law to find a mean between these two extremes which can be sanctioned legally.

Generally, in international law effectiveness assumes significance in two areas. On the one hand, where the demands of subjects of international law are based on definite facts, the principle of effectiveness becomes valid for these facts, i.e., a State which claims sovereignty over a particular territory must effectively control this territory in its entirety.

On the other hand

illegal activity may produce valid results by the operation of prescription, acquiescence, and estoppel.³⁰⁰

In international law acquiescence has proved to be a useful means to reconcile actual situations in which there is doubt whether they are founded in accordance with the prescriptions of international law.

Acquiescence, in the accepted dictionary sense of tacit agreement or consent, is essentially a negative concept. ...it is ... the inaction of a State which is faced with a

299. Strupp-Schlochauer (f.n.40), Bd. 1 p. 411.

300. Brownlie (f.n.44), p. 415.

situation constituting a threat to or infringement of its rights: it is not intended to connote the forms in which a State may signify its consent or approval in positive fashion. Acquiescence thus takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection.³⁰¹

Tucker attributes to acquiescence the same value without using this designation, when he says:

What nonrecognition does imply in this instance, if anything, is the denial of the existence of a general rule of international law that effective control of a territory by a government constitutes sovereignty over the territory (or as some writers prefer to say—does not result in a valid title) if this control has been established illegally.³⁰²

Also Krueger and de Visscher³⁰³ see the connection between the principle of effectiveness and the recognition or nonrecognition of actual facts.

The Convention on the Law of Treaties recognizes as well in Article 45 acquiescence as a law-evoking fact,³⁰⁴

301. Mac Gibbon (f.n.297), p. 143.

302. Tucker (f.n.296), loc.cit. p. 42.

303. Krueger, Das Prinzip der Effektivität, oder: über die besondere Wirklichkeitsnähe des Völkerrechts, loc.cit. p. 281; de Visscher, Observations sur l'effectivité en droit international public, end.c.pp. 603-4.

304. Rozakis writes: "The text of article 45, alinea (b) embodies the well-known anglo-american principle of acquiescence which seems to have been transposed into international law (loc.cit. p. 159). But it is true, that the principle of acquiescence existed before the Convention was given as a legal standard in this scope.

when it determines that

a State may no longer invoke a ground for invalidating, terminating...of a treaty,... if, after becoming aware of the facts:... (b) it must be reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.³⁰⁵

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305. UN Doc.A/CONF.39/11/Add. 2, p. 295; text of paragraph (b) means estoppel by subsequent conduct.

"It is of course a general principle of international law that the subsequent conduct of the parties to a bilateral - or a multilateral - instrument may throw light on the intention of the parties at the time the instrument was entered into and thus may provide a legitimate criterion of interpretation" (The Case Law of the International Court, Vol. IV-A, p. 117).

Sinclair explains (loc.cit.p. 88): "Article 45 is to prohibit a State from claiming that a treaty is invalid on grounds of lack of competence, restrictions on authority to express consent, error, fraud or corruption, or from seeking to terminate or suspend the operation of a treaty on grounds of material breach or fundamental change of circumstances if, after becoming aware of the facts, the State has expressly agreed that the treaty is valid or must, by reason of its conduct, be considered as having acquiesced in the validity of the treaty or its maintenance in force or in operation. It should be noted that there are differences between the principle of acquiescence and the operation of estoppel, although the effect may, in particular circumstances, be very similar. But where acquiescence is an element in the establishment of title to territory by prescription, what must be proved is the acquiescence of States generally, or at least those States adversely affected by the claim. By way of contrast, estoppel is a matter of adjectival, rather than substantive, law and accordingly the effect of a true estoppel is confined to the parties. It is also relevant that estoppel is a concept of general application, the essential aim of which is to preclude a party from benefiting by his own inconsistency to the detriment of another party who has in good faith relied upon a representation of fact made by the former party.

The Commentary to the corresponding draft

Article 42 states:

The foundation of the principle that a party is not permitted to benefit from its own inconsistencies is essentially good faith in their dealings (allegans contraria non audiendus est). The relevance of this principle in international law is generally admitted. ... The principle has a particular importance in the law of treaties. ...

Sub-paragraph (b) provides that a right to invoke a ground of invalidity, termination, etc. shall also be no longer exercisable if after becoming aware of the facts a State's conduct has been such that it must be considered as having acquiesced, as the case may be, in the validity of the treaty or its maintenance in force or in operation. In such a case the State is not permitted to take up a legal position which is in contradiction with the position which its own previous conduct must have led to the other parties to suppose, that it had taken up with respect to the validity, maintenance in force or maintenance in operation of the treaty.³⁰⁶

In the case of the Munich Agreement the aid of acquiescence is not necessary, since the most important States of the world, through their conduct when the treaty was concluded, as well as during its execution and particularly through their treatment of the former Czechoslovak citizens, who as a result of the Agreement had become Germans, considered the Agreement valid until March 15, 1939.

³⁰⁶. UN Doc.A/CONF.39/11/Add. 2, p. 59.

2) The Consideration of the Nullity "ex nunc"
of the Agreement

By the annexation of the rest of Czechoslovakia in the middle of March 1939 Hitler undertook an action, which could not be justified either politically or legally. While hitherto he had claimed only territories with predominantly German population for the German Reich with reference to the right of self-determination, by the annexation of Bohemia and Moravia he annexed two territories incontestably inhabited by Czechs.

He attempted to give the impression of legality when, on March 15, 1939, he forced President Hacha of the Czechoslovak Republic to sign a treaty in which Germany assumed the protection of the people of Czechoslovakia.³⁰⁷ The Nuremberg Military Tribunal was able to prove that the consent of President Hacha had been

307. Document No. 9.

It must be remarked that the treaty was included in the registry of the Political Department of the Foreign Office under the listed heading and received the designation: "Treaties Czechoslovakia No. 3", but was not published in the Law Gazette of the Reich (usually in Part II in accordance with the "Bekanntmachung" in Law Gazette Part I, 1922, p. 232).

Article 45, paragraph 3 provided that treaties with foreign countries needed the assent of the Reichstag (Reich's Diet) as far as they referred to objects of legislation of the Reich, with the consequence that an analogous law of ratification had to be enacted and published. But under a law of March 24, 1933 (Law Gazette I p. 141), the so-called "Ermächtigungsgesetz" (Enabling Act),

these provisions were modified, so that these treaties did not need the assent of the legislative bodies. In this way the constitutional requirement of the participation of the Reichstag was expressly removed, notwithstanding that through the introduction of the so-called "Führer Principle" large segments of the Weimar Constitution were nullified and no specific regulation existed which indicated whether and which ordinances of the Weimar Constitution were still valid.

According to National Socialist theory, the "Führer" as supreme law-giver, was in the position to nullify any legal or constitutional rule. Therefore, the treaty could not be invalidated on the grounds of non-compliance with German domestic law.

obtained by force and was, therefore, void.³⁰⁸

The treaty is cited in a few matters:

Es wurde Hacha eröffnet, dass, falls er ein Abkommen über die sofortige Einverleibung des tschechischen Volkes in das Deutsche Reich unterzeichne, Böhmen und Mähren vor der Zerstörung gerettet würden. Es wurde ihm mitgeteilt, dass die deutschen Truppen bereits Marschbefehle erhalten hätten und dass jeder Widerstand gewaltsam gebrochen werden würde. Der Angeklagte Göring fügte die Drohung hinzu, dass er Prag vollständig aus der Luft zerstören werde. Vor diese schreckliche Wahl gestellt, unterzeichneten Hacha und sein Aussenminister das erforderliche Abkommen... und Hitler und Ribbentrop gaben ihre Unterschriften im Namen Deutschlands.

Then:

Göring war einer der fünf bedeutenden Führer, die an der Hossbach-Konferenz vom 5.11.1937 teilnahmen, und er wohnte den anderen bedeutsamen Konferenzen bei, die in diesem Urteil bereits erörtert wurden. ...In der Nacht vor dem Einfall in die Tschechoslowakei und der Aufsaugung Böhmen und Mährens drohte er bei einer Konferenz zwischen Hitler und dem Präsidenten Hacha, Prag mit Bomben zu bewerfen, falls Hacha nicht nachgebe. Diese Drohung gab er in seiner Zeugenaussage zu.

Further:

Ribbentrop war...bei der Besprechung vom 14. und 15.3. zugegen, bei der Hitler durch Androhung einer Invasion den Präsidenten Hacha dazu zwang, der Besetzung der Tschechoslowakei durch die Deutschen zuzustimmen.

308. A.J.I.L. Vol. 41 (1947), pp. 172 (325). See also Delbez (f.n.29), p. 320.

Moreover:

Keitel...der Chef des OKW war bei den Unterhandlungen zwischen Hitler und Hacha, die mit der Kapitulation des letzteren endeten, zugegen.

Finally:

...am 18.3.1939 wurde v. Neurath zum Reichsprotector von Böhmen und Mähren ernannt. Böhmen und Mähren wurden durch militärische Streitkräfte besetzt. Hachas Zustimmung, die ihm ja unter Zwang abgenötigt worden war, kann nicht als Rechtfertigung dieser Besetzung angesehen werden. 309

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309. Das Urteil von Nürnberg, pp. 54-5, 172-3, 182, 186, 255. E.t.: Nazi Conspiracy and Aggression, pp. 27, 108, 114, 116, 160; A.J.I.L. (f.n. 308), pp. 197, 272-3, 278, 281, 325:

The proposal was made to Hacha that if he would sign an agreement consenting to the incorporation of the Czech people in the German Reich at once, Bohemia and Moravia would be saved from destruction. He was informed that German troops had already received orders to march and that any resistance would be broken with physical force. The defendant Goering added the threat that he would destroy Pragua completely from the air. Faced by this dreadful alternative, Hacha and his Foreign Minister put their signature to the necessary agreement..., and Hitler and Ribbentrop signed on behalf of Germany.... Goering was one of the five important leaders present at the Hossbach Conference on November 5, 1937, and he attended the other important conferences already discussed. ...The night before the invasion of Czechoslovakia and the absorption of Bohemia and Moravia, at a conference with Hitler and President Hacha he threatened to bomb Pragua if Hacha did not submit. This threat he admitted in his testimony. ...Ribbentrop...was present at the conference of March 14/15, 1939 at which Hitler, by threats of invasion, compelled President Hacha to consent to the German occupation of Czechoslovakia. ...Keitel ...the OKW Chief attended Hitler's negotiations with Hacha when the latter surrendered. ...Von Neurath was appointed Reich Protector for Bohemia and Moravia on March 18, 1939. Bohemia and Moravia were occupied by Military force. Hacha's consent, obtained as it was by duress, cannot be considered as justifying the occupation.

Mc Nair writes:

This Article (namely Art. 32 of the Harvard Research on Treaties concerning "Duress") is followed by a full comment upon the relevant literature and upon certain political incidents in which the matter came under discussion; to which must now be added the shocking case of coercion applied by the Hitler German Government to Dr. Hacha, the President of Czechoslovakia, in March 1939 in order to compel him to sign the Agreement of 15 March 1939 with Hitler.³¹⁰

Brosche rightly points out that the treaty of March 15, 1939, which in the literature is so often described as a terrifying example of an imposed conclusion of a treaty, was, in fact, concluded under duress, but he cannot bring himself to acknowledge that the reason for the nullity of this treaty was the massive pressure exercised against President Hacha. A record of the meeting between Hitler and Hacha read out at the Nürnberg Trial shows that no duress was exercised against the Czechoslovak delegation, and that the negotiators were actually treated with exceptional politeness. Consequently, the duress which caused the treaty to be concluded was directed against the State and not against the State representatives, since Hacha signed the treaty in order to avert any harm that might have arisen from the German threat to destroy Prague and other places in the rest of Czechoslovakia.³¹¹

310. Mc Nair (f.n.195), p. 208.

311. Brosche (f.n.207), p. 110-1.

Also Seidl-Hohenveldern endorses this view. He criticises the above-mentioned decision of the Nuremberg Military Tribunal on the ground that the duress exercised had not consisted in a threat against the person of the President but against the State (the threat of bombardment).³¹²

This view must be contradicted. The fact that the Czech negotiators yielded to German demands must be attributed simply to the predicament of the Czech negotiators being pressed by the German demands, and not to the "duress against the State itself".

Nevertheless, the Comment to Draft Article 48 of the Convention on the Law of Treaties runs as follows:

It is true that in some instances it may not be possible to distinguish completely between coercion of a Head of State or Minister as a means of coercing the State itself and coercion of them in their personal capacities. For example, something like third-degree methods of pressure were employed in 1939 for the purpose of extracting the signatures of President Hacha and the Foreign Minister of Czechoslovakia to a treaty creating a German protectorate over Bohemia and Moravia, as well as the gravest threats against their State. Nevertheless, the two forms of coercion, although they may sometimes be combined, are, from a legal point of view, somewhat different; the Commission has accordingly placed them in separate articles.³¹³

312. Seidl-Hohenveldern (f.n.80), p. 86.

313. UN Doc. CONF.39/11/Add. 2, p. 65.

Germany's deception did not fool anyone. The Czechoslovak Constitution did certainly not allow the President of the State to transfer the State entrusted to him to a foreign Power without the assent of Parliament and Government. Therefore, there is no doubt that Hacha lacked the authority to deliver the rest of Czechoslovakia to the German Reich and the "Agreement" between Hitler and Hacha was for this reason invalid.³¹⁴

With regard to Article 46 paragraph 1 of the Convention on the Law of Treaties

...unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

and according to the Commentaries to the draft of the corresponding Article 43,³¹⁵ adopted by the International Law Commission, it would be hard to imagine a case in which the violation of national law would be more manifest and would concern a rule of more fundamental importance than

314. See Brownlie (f.n.44), p. 494; Lauterpacht (f.n.41), Vol. I, p. 884; Mc Nair (f.n.36), p. 60-1.

315. ...the rule embodied in the article is that, when the violation of internal law regarding competence to conclude treaties would be objectively evident to any State dealing with the matter normally and in good faith, the consent to the treaty purported to be given on behalf of the State may be repudiated (UN Doc. A/CONF. 39/11/Add. 2 p. 62).

the cession of the Czech National State to Hitler.

At first sight, there does not seem to be any decisive and substantial difference - with regard to the constitutional limitation of a State organ to dispose of state territory - between the Czech Declarations of September 21 and 30, 1938, ceding the Sudeten territory, and Hacha's decision of March 15, 1939. Dahm's view on the legal content of the two above-mentioned legal acts of 1938 and 1939 is, thus, not greatly at variance when he states:

Im Jahre 1938 setzte der Präsident der tschechischen Republik das Münchener Abkommen ohne Ermächtigung durch die Nationalversammlung in Kraft. Da das Abkommen aber die Grenzen des Staates veränderte, so hätte die Nationalversammlung zustimmen müssen. Eine noch weitergehende Entscheidung traf der Staatspräsident Hacha am 15.3.1939, als er die Entscheidung über das Schicksal seines Volkes der Führung des Deutschen Reiches überliess.³¹⁶

A substantial difference between the two legal acts, though, may be seen in the fact that in September 1938 a type of emergency parliament in the form of a committee, representing the responsible factions of the political parties, was formed. This committee actively assisted the President - who according to the law of May 13, 1936 enjoyed

316. Dahm (f.n. 28), Bd. 3, p. 22; E.t.: In 1938 the President of the Czechoslovak Republic enacted the Munich Agreement without being empowered to do so by the National Assembly. However, since the Agreement changed the country's frontiers, the consent of the National Assembly should have been obtained. President Hacha made an even more farreaching decision on March 15, 1939 when he left the destiny of his people to be decided by the leadership of the German Reich.

greater freedom of action in international acts in the presence of "extraordinary circumstances" - in his decision-making; whereas the Hacha Agreement never even reached this stage at all.

Moreover, one cannot escape the fact that by concluding the Hacha Agreement, the German Reich infringed in a clear and "manifest" way Czech constitutional rules, in violation of the definition of the present Article 46, paragraph 2 of the Convention on the Law of Treaties; the same cannot be said of the Munich Agreement.

The argument can be taken a step further by putting the question in the negative, namely if the German Reich, as contractual party to the agreements, would have had to refer to the Agreement in order legally to substantiate a certain legal position, could it have been accused, in such a case, of violating the principles of good faith. In the case of the Munich Agreement such a breach of trust and good faith must certainly be discounted just as much as it must be emphatically confirmed in the case of the Hacha Agreement.

It may also be said that the Hachha Agreement represented exactly the extreme opposite of what the International Law Commission had been afraid of when - in the sphere of constitutional limitations - it recognised only those nullity grounds of international treaties which had a certain effect. In this connection, a commentary to the draft of Article 43 of the Convention says:

...the majority of the diplomatic incidents in which States have invoked their constitutional requirements as a ground of invalidity have been cases in which for quite other reasons they have desired to escape from their obligations under the treaty. Where a Government has genuinely found itself in constitutional difficulties after concluding a treaty and has raised the matter promptly, it appears normally to be able to get the constitutional obstacle removed by internal action and to obtain any necessary indulgence in the meanwhile from the other parties. Confronted with a challenge under national law of the constitutional validity of a treaty, a Government will normally seek to regularize its position under the treaty by taking appropriate action in the domestic or international sphere.³¹⁷

But the invalidity of the arrangement signed by Hacha is more evident for another reason.

According to international law, coercion exercised against a representative of a State in the conclusion of a treaty nullifies the treaty.³¹⁸ Hitler's "agreement" with Hacha is even regarded as a test case for such personal coercion against a representative of a State.³¹⁹

317. UN Doc. A/CONF.39/11/Add. 2 p. 62.

318. McNair (f.n.36), p. 207; O'Connell (f.n.80), Vol. 1, p. 261; Lauterpacht (f.n.41), Vol. I, p. 891; Brownlie (f.n.44), p. 495.

319. O'Connell, Ibid.; McNair, Ibid., p. 208.

The Nuremberg Judgement determined that:

Hacha's consent, obtained as it was by duress, cannot be considered as justifying the occupation.³²⁰

Moreover, the extent of the pressure exerted on Hacha is demonstrated by the fact that Sudeten Germans living in the rest of Czechoslovakia rose in arms and at the same time Slovakia was separated from the State.³²¹

There exists little controversy over the invalidity of the Hitler-Hacha Agreement as well as the illegality according to international law of the annexation of the rest of Czechoslovakia. From the point of view of the British Government and that of the Federal Republic of Germany the reason the Munich Agreement became invalid was because of this violation of international law. The British declaration of March 17, 1939 stated that the events of the past few days were a complete repudiation of the Munich Agreement.³²² And the note of

320. Nazi Conspiracy and Aggression, p. 160; Judicial Decisions, A.J.I.L., p. 325; See also Berber (f.n.80), Bd. 1, p. 438.

321. Kempner, loc.cit.: "Meissner sagte: "Hitler und seine Leute haben diese Situation zweifellos ausgenutzt und in diesem Sinn kann man auch von einem gewissen Druck sprechen." E.t.: Meissner said: Hitler and his men undoubtedly exploited this situation and in this sense one can speak of a certain pressure.

322. Marcus writes: "1) Le traité est en effet en contradiction avec une autre traité que le Reich allemand a conclu, à peine six mois auparavant, avec la Grande-Bretagne, la France et l'Italie... .

D'après les autorités les plus compétantes du Droit international, au cas de conflit entre deux traités, conclus par un même Etat avec des co-contractants différents, le plus récent est à considérer comme nul. 2) Le représentant de la République tchécoslovaque a signé le traité de Berlin sous la menace. 3) La conclusion du traité de Berlin a eu lieu en violation de la Constitution tchécoslovaque. ... En effet, le sens de Constitution et ses dispositions concernant la conclusion des traités internationaux ne permet pas au chef de l'Etat de conclure des traités par lesquels l'existence de l'Etat en tant qu'Etat souverain est supprimée" (Le Traité germano-tchécoslovaque du 15 mars 1939 à la lumière du droit international, end.c. pp. 653-4, 663).

E.t.: 1) In relation to its validity the treaty stands in contradiction to another treaty, namely that which Germany concluded with Great Britain, France and Italy just 6 months previously... . In the view of leading authorities, the one last concluded is to be considered void, even if it has been concluded by the same State with another treaty partner. 2) The representative of Czechoslovakia signed the Treaty of Berlin under pressure. 3) The conclusion of the Berlin treaty was in violation of the Czechoslovak constitution ...In fact, neither the spirit of the constitution nor its prescriptions which concern the conclusion of international treaties, permit the Head of State to conclude treaties through which the sovereignty of a State as well as its existence is eliminated.

August 5, 1942 to the Czechoslovak Government-in-exile stated that Germany had deliberately destroyed the arrangements concerning Czechoslovakia reached in 1938.³²³ The German note to Czechoslovakia of March 25, 1966 declared that the Munich Agreement was disrupted by Hitler.³²⁴ All this can only mean that the Munich Agreement was invalidated by the events of the middle of March, 1939.

When Czechoslovakia acceded to the German demands for cession of the territories inhabited predominantly by Germans, she hoped to maintain the independence of her remaining territories, and there is no doubt that it was the prevailing view that Germany, after the transfer of the predominantly German territories, would leave the remaining Czechoslovak territories untouched and grant the promised guarantee with regard to the Czechoslovak possessory title.

It is a principle of international law that a material breach of a treaty by one party gives all the parties to the treaty the right to terminate the treaty; the only debate concerns whether each breach of the treaty is sufficient for its termination.³²⁵

323. Carlyle, loc.cit., p. 317-8.

324. Staatslexikon, X. Bd. col. 688.

325. See Lauterpacht (f.n.41), Vol. I, p. 947; McNair (f.n.36), pp. 474-84; O'Connell (f.n.80), Vol. I, pp. 284-6.

For our purposes this difference of opinion is important, since the British Government explained through its Ambassador in Berlin that there was not only a simple violation of the treaty by Germany, but a "complete repudiation of the Munich Agreement".³²⁶ Thus, it is expressed that because of Hitler's behaviour, the basic meaning of the agreement was destroyed.

The difference between "violation of a provision" and a "repudiation of the treaty" is outlined in Article 60, paragraph 3 of the Convention of the Law of Treaties.

There among other things it says:

3. A material breach of a treaty, for the purpose of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.³²⁷

Thus, in principle the repudiation of a treaty is to be viewed as a material breach of that treaty whereas in the case of a violation of a provision other factors introduced in the text have to be considered: one needs to determine whether the violated provision, in reference to the object and purpose of the treaty, represents a material breach of the treaty.

326. Toynbee, loc.cit. p. 71; Pergler, The Munich "Repudiation", loc.cit. pp. 308-9.

327. UN Doc. A/CONF.11/Add. 2, p. 297.

In the commentary to the corresponding draft Article 57 of the International Law Commission, it states:

Clearly, an unjustified repudiation of the treaty - a repudiation not sanctioned...would automatically constitute a material breach of the treaty;...The other and more general form of material breach is that in sub-paragraph (b)...³²⁸

Thus it is clearly expressed that the repudiation of a treaty, in reference to its legal significance, is not to be considered a reason for terminating the treaty.

The termination of a treaty is effected by a declaration from the State concerned with the violation of a treaty to the State responsible for the violation. This question is settled today by means of Article 65, paragraph 1, sent. 1 and Article 67, paragraph 1 of the Convention which state:

1. A party which, under the provision of the present Convention invokes ...a ground for impeaching the validity of a treaty, terminating it, ...must notify the other parties of its claim... (65/I)

The notification must be made in writing.³²⁹ (67/I)

Article 70 describes the consequences of a termination of a treaty as follows:

1. ...the termination of a treaty under its provisions or in accordance with the present Convention:...releases the parties from any obligation further to perform the treaty.³³⁰

328. Ibid., p. 75.

329. Ibid., p. 298.

330. Ibid.

Waldock formulated in his report to the I.L.C. of 1966 the consequences of the abrogation of a treaty as follows:

...the lawful termination of a treaty shall...release the parties from any obligation further to apply the treaty...³³¹

In essence, this point of view corresponds to the general principle of international law in this matter, which Schlochauer formulates as follows:

Eine Partei, die einen Vertragsbruch seitens des Vertragspartners geltend macht, kann selbst vom Vertrag zurücktreten. Der Rücktritt wird unter solchen Umständen zur Sanktion. Die Rechtmässigkeit eines solchen Rücktritts hängt davon ab, ob der Vertrag vom anderen Partner tatsächlich verletzt wurde.³³²

Although there exists little doubt that the German Reich repudiated the Munich Agreement, it is difficult nonetheless to determine exactly when the treaty was terminated.

In so far as Czechoslovakia was involved in this question, this State had been eliminated as a subject of international law and was accordingly unable to express such a termination. After Czechoslovakia was restored she

331. Sixth report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur, UN Doc. A/CN.4/186. p. 57.

332. Strupp-Schlochauer (f.n.40), Bd. 3, p. 539. E.t.: A party which accepts the termination of a treaty by its treaty partner, can release itself from the treaty. This abrogation is under these conditions a sanction. The legality of such an abrogation depends on whether the treaty was violated by the other partner.

found herself in a state of war with Germany. A state of war existed between Germany and the United Kingdom was well after the breach of the treaty. Therefore, a formal notification of the termination of the treaty was precluded by these developments, although the relevant British, French, and Italian positions were known to the Reich during the war.³³³

It is difficult to determine exactly when the treaty became invalid. A treaty which is broken first becomes invalid when the State concerned with the violation of the treaty decides to renounce it. The State may also decide to continue the treaty.³³⁴ The Federal Republic never did refer to the fact that the termination of the Munich Agreement was never officially communicated. On the contrary, she explained in her reply to the comment of the Federal Council during the debate on the German-Czechoslovak treaty:

Die Bundesrepublik Deutschland hat ...
niemals bestritten, dass das Münchener
Abkommen durch die während des Zweiten
Weltkrieges von Grossbritannien, Frankreich
und Italien abgegebenen Erklärungen seine

333. Korkisch, loc.cit. pp. 83-8; 99-105.

334. Lauterpacht (f.n.41), Vol. I p. 947 ("...that it is for the injured party to consider for itself whether violation of a treaty...justifies its cancellation."). McNair (f.n.36), p. 553 ("...the other party may prefer to maintain it in existence").

ursprüngliche Rechtswirkung verloren
hat.³³⁵

Thus, opinion is unanimous that the Munich Agreement became invalid because of these declarations made by the Allies.

However, a distinction must be made between provisions already performed and those not yet performed in such subsequent invalidation of treaties.

Mc Nair writes:

In so far as the provisions of a treaty have already been executed and have had their effect before the termination, they have passed beyond the sphere of the operation of the termination; something has been done; for instance, territory has been ceded, persons or movables have been surrendered, and in many cases new rights and statuses have been created which, although they owe their origin to the treaty, have acquired an existence independent of it; the termination cannot affect them.³³⁶

This principle is also expressed in Article 60, paragraph 1 of the Convention on the Law of Treaties, which provides that

a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a reason for terminating the treaty or suspending its operation in whole or in part.³³⁷

335. BT-Drucksache 7/1832, p. 19. E.t.: The Federal Republic of Germany...has never denied that the Munich Agreement lost its original legality by the declarations of Great Britain, France and Italy in the course of the Second World War.

336. McNair (f.n.36), p. 531.

337. UN Doc. A/CONF. 39/11/Add. 2, p. 297.

The Convention expresses nothing but the codification of these rules. Accordingly, the legal positions created by the Munich regulations, especially those stemming from the Czechoslovak cession of territory, the change of nationality, and the legal situation of private corporations and public companies were not eo ipso revised.

Without the agreements embodied in the German-Czechoslovak Treaty of 1973, the status of the ceded territory and the nationality of the inhabitants taken over by the Czechoslovak Government would also have changed in accordance with the principle of effectiveness through an alteration of relations; i.e., conquest of these territories by the allied forces and their cession to the Czechoslovak State. The treaty between Bonn and Prague has, as will be explained, established an arrangement which corresponds to the above-mentioned maxims of law.

Part III

The Model for Settlement offered in the German-Czechoslovak Treaty of 1973¹

1) The Basic Conception of the Treaty

The viewpoint of the Czechoslovak Government that the Munich Agreement had been invalid from the beginning and their insistence that this opinion be expressed in a treaty concerning mutual relations long prevented the normalization of relations between the two countries.

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1. In the case, file number 1 BvQ 5/74 of the Federal Constitutional Court (see Part I, f.n.91, paragraphs 8 and 9) the complainant argued that the treaty prevented him, as sole individual or together with others, from bringing claims for the recovery of Sudeten German territory. Moreover as owner of a landed estate in this territory he claimed that the treaty represented a violation of the guarantee of property under the constitution.

The Federal Constitutional Court in its decision of July 11, 1974 (see Part I, f.n.9 at p. 73) stated that the treaty with the CSSR contained no provision which might restrict the complainant's freedoms of opinion and association. Inasmuch as he feared the definitive loss of his property by the coming into force of the treaty, it was pertinent to observe that up till now he had not been in any position to exercise his rights in this matter. In the considered political opinion of the competent authorities, to delay the coming into force of an important international treaty was not justifiable.

Concerning this case, it must be remarked that the legal remedy of the complainant was nearly exclusively restricted to the claim that the conclusion of the treaty violated basic rights under constitutional law (Articles 93 para 1 No. 4a CL, 90 para 1 LFCC).

In this connection, however, it must be pointed out, that the Federal Constitutional Court has sought in an

extensive judgement to improve the legal position of the individual with regard to his right of challenge. The standing of the individual to raise questions of constitutionality - the limits of which are prescribed by Article 93 para 1 No. 4a CL, Article 90 para 1 LFCC - has been liberalized by the decisions of the Court with regard to the requirement to show infringement of a material right, Sedes materiae here is first Art. 2 para 1 CL:

"Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmässige Ordnung oder das Sittengesetz verstösst" (Everyone has the right to the free expression of his personality provided he does not violate the rights of others, the constitutional order, or moral laws). That provision is procedurally covered by Art. 93 para 1 No. 4a CL, Art. 90 para 1 LFCC.

Art. 2 para 1 CL was interpreted at an early stage by decisions of the Federal Constitutional Court as incorporating rights in addition to the express language of the statute so as to make it a comprehensive right supplementing the other individual constitutional rights (cf., e.g., BVerfGE 13, 290 (296); 19, 206(225); this rule can claim in the widest sense to be unencumbered by considerations of unconstitutionality (BVerfGE 9, 83(88); 19, 206(215); 253(257); 29, 402(408); 33, 44(48)).

According to Art. 2 para 1 CL, this comprehensive right may only be restricted by a law which conforms to the "constitutional order". Viewed from a procedural aspect this means: anybody bringing a suit raising a question of constitutionality can claim that a law limiting his rights arising out of Art. 2 para 1 CL does not belong to the constitutional order, since it contravenes, in form and substance, individual constitutional rules (not mentioned in Art. 93 para 1 No. 4a CL, Art. 90 para 1 LFCC) or general constitutional principles (BVerfGE 6, 32(41); 10, 89(99); 21, 54(59)).

In the present case just as in the proceeding on the merits (see Part I, f.n. 91, paragraph 12 at p. 73; paragraph 11 below and the decision of the LFCC listed in the addendum of the thesis at pp. 462-74), however,

the Federal Constitutional Court could not allow such a liberal interpretation because it was of the opinion that the treaty did not impinge on any express legal position of the complainants.

Notwithstanding this, only such treaty clauses of international law can be converted into binding national law by an act of ratification which - according to national laws - have all the necessary prerequisites to create rights and obligations; the text, purpose and content of the contractual clause must be capable of creating legal effects, as a national statutory regulation would, if the citizen is to be legally bound by it (BVerfGE 29, 348, 360). Only such contractual clauses which comprise definite executable legal principles are thus part of the national body of law in the sense that the individual could himself be immediately and directly legally affected.

A general examination of the treaty with Czechoslovakia to determine its constitutionality, which was conducted by the Federal Constitutional Court in the case of the Treaty on the Basis of Relations between the Federal Republic of Germany and the German Democratic Republic of December 21, 1972, the so-called Basic Treaty (Law Gazette 1973 II, pp. 421, 423, E.t.: in: Documentation Relating to the Federal Government's Policy of Détente, pp. 71-4) did not take place. In principle only (in our cases theoretically), the Federal Government itself, or a government of a Federal State or a group of at least one-third of the representatives of the Federal Diet (Article 93 No. 2 CL, Article 13 No. 6 in connection with Article 76 No. 1 LFCC) were authorized to set in motion such a procedure.

With its decree of January 25, 1977 the First Senate of the Federal Constitutional Court has rejected the complaints of unconstitutionality joined together for the purpose of a collective decision.

The decree also issued by the First Senate is completely in alignment with the decision of the Court relating to the laws securing assent to the Treaties of Moscow and Warsaw (Federal Constitutional Court 40, 141-79) as far as questions of principle with respect to the constitutional possibility of examining the treaties bound by international law is concerned, treaties which are of a highly political nature inasmuch as they deal with individual legal positions.

The fact that the Court based its decision on the Treaties of Moscow and Warsaw became public knowledge almost immediately.

The Court expressly refers to this decision without repeating the guiding principles contained in it, so that it appears highly appropriate to refer to these governing principles in connection with the examination of the decision taken by the Court on the German-Czechoslovak Treaty.

In that cases (Treaties FRG/U.S.S.R.; FRG/People's Republic of Poland) the Court held that:

"1. Die Verträge von Moskau und Warschau (Ostverträge) haben hochpolitischen Charakter; sie regeln die allgemeinen politischen Beziehungen der Bundesrepublik Deutschland zur Sowjetunion und zu Polen.

Verfassungsbeschwerden gegen die Zustimmungsgesetze zu diesen Verträgen, die auf die Verletzung der Art. 14 GG (guarantee of ownership, guarantee of succession, principles of expropriation), 16 (deprivation of citizenship, extradition, right of asylum), 6 (protection of the family) gestützt werden, sind unzulässig. (The texts contained in brackets are those of the authors).

2. Die Zustimmungsgesetze zu den Ostverträgen, ebenso wie diese Verträge selbst, begründen keine unmittelbaren Verhaltenspflichten Einzelner. Sie sind auch nicht geeignet, in anderer Weise grundrechtlich geschützte individuelle Rechtspositionen unmittelbar zu verschlechtern. Sie schmälern keine Vermögensrechte; sie bewirken keinen Verlust der deutschen Staatsangehörigkeit; sie beeinträchtigen nicht die Bemühungen um Zusammenführung getrennter Familien.

3. Verfassungsbeschwerden gegen Zustimmungsgesetze zu völkerrechtlichen Verträgen mit allgemeinen politischen Inhalt wie den Ostverträgen sind unzulässig, wenn mit ihnen die verfassungsgerichtliche Feststellung erstrebt wird, bei den Vertragsverhandlungen hätte eine bestimmte sachliche Regelung zugunsten der Beschwerdeführer erreicht werden müssen und der Abschluss des Vertrages ohne diese Regelung habe die "Unwirksamkeit des ganzen Vertrages zur Folge" (BVerfGE 40, 141-179 (141)).

E.t.: 1. The Treaties with Moscow and Warsaw (the Ostverträge) are of a highly political nature; they govern the general political relations of the Federal Republic of Germany with the Soviet Union and Poland.

Suits challenging the constitutionality of the ratification of these treaties and which rely on a breach of Art. 14, 16, 6 CL are inadmissible.

2. The laws securing assent to the Ostverträge, like the treaties themselves, create no direct legal duties for the individual. Neither do they have the power to prejudice directly in any other way individual legal standings protected by the constitution. They do not restrict any property rights; they do not cause the loss of German nationality; they do not hamper the efforts to reunite separated families.

3. Constitutional complaints against laws securing assent to treaties of public international law of a highly political nature like the Ostverträge, are inadmissible if their sole purpose is to obtain a Constitutional Court ruling declaring that a more concrete settlement in favour of the complainants should have been reached during the treaty negotiations, and that the conclusion of such an agreement without such a settlement makes the entire treaty void.

Shortly after the completion of the thesis the reasons of the still unpublished decision by the Federal Constitutional Court of January 25, 1977 became officially available to the author. Our analysis of the German-Czechoslovak Normalization Treaty would be incomplete, if we had not added in an addendum the decision in its exact wording.

It took sometime for it to be recognized in Germany that this Czechoslovak desire was rooted in the psychological shock which the Munich adjustments had caused. The same psychological motive explains why Czechoslovakia (unlike the other Eastern States, which do not consider the Federal Republic identical with the Reich) demanded a declaration on the Munich Agreement which from the Czechoslovak standpoint is a res inter alios acta for the Federal Republic. This fact, on the one hand, and the domestic situation in the Federal Republic, on the other hand, explain why complete agreement among the contracting parties over the question of the initial nullity of the Munich Agreement or its subsequent voidness was impossible.

Certainly, the Federal Republic considers herself the successor to the German Reich and, thus, was not at all prevented from taking a position on the Munich Agreement. Nevertheless, the interpretation of the Munich Agreement making it void from the beginning could not be brought into harmony with the legal position of the Federal Republic on this question,² not only because Great Britain as a signatory power maintained that the Treaty was originally valid, but also because of the very effective pressure

2. Kimminich, Die Aussagen des Prager Vertrages zum Münchener Abkommen in völkerrechtlicher Sicht, loc.cit., pp. 22-6; Kimminich-Rumpf, Ostverträge etc. p. 181.

exercised by the groups most affected, the expellees and their officials in the Sudetendeutsche Landsmannschaft (Sudeten German Fellowship).³

Akehurst states clearly:

West Germany's freedom of manoeuvre has been limited by domestic political considerations. Most of the German-speaking inhabitants of Czechoslovakia (including the Sudetenland) were expelled by Czechoslovakia in 1945, and many of them settled in West Germany. These refugees, supported by other refugees from the Oder-Neisse territories and elsewhere, formed a powerful pressure group, and it may be partly because of the influence of this pressure group that the West German government has never admitted that the Munich agreement was void ab initio.⁴

Consequently there was no other possibility but to leave open the question whether the Munich Agreement was void from the beginning or became invalid later, if both States did not want to destroy the prospects for the normalization of relations in the future. The possibility for compromise existed, however, because there

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3. On July 14, 1973 the so-called Federal Assembly of the Organisation of Sudeten German Exiles approved a declaration of the Sudeten German Council to the "Treaty on Mutual Relations Between the Federal Republic of Germany and the Czechoslovak Socialist Republic". The two Sudeten German organs, which had convened on the same day, instituted court proceedings against the Treaty, on the grounds that it endangers the legal position not only of the Sudeten Germans but of all the German people and that it bypasses the still unsolved problems of the lingering Sudeten issue (FAZ, July 15, 1973).
 4. Akehurst, Burying the Munich Agreement, loc.cit. p. 473.

was general agreement about the nullity of the Agreement, indicated by the declaration of the Federal Republic of March 25, 1966,⁵ and because the Czechoslovak Government was willing not to seek further advantages in spite of their interpretation of the Agreement.

Although the opposing views were carefully preserved through treaty provisions, the outstanding differences were not exaggerated. Thus, Article I of the Treaty indicates that both parties to the present Treaty consider the Munich Agreement of September 29, 1938 void. This formulation leaves open the question whether the contracting parties were also parties to the Munich Agreement and, further, the question as to what legal position was adopted by each of the parties relative to the Agreement.

In the relations between the Federal Republic and Czechoslovakia (and not erga omnes) the Agreement of September 29, 1938 is considered void without consideration of the Munich Conference Powers' attitude toward the Agreement or previously expressed legal opinions. Furthermore, it is mentioned when the treaty became invalid. There is also nothing said about the legal significance of the declaration of the Czechoslovak Government on

5. Staatslexikon, X. Bd. col. 688; see Part I, f.n.80 of this thesis.

September 30, 1938 and the execution of the agreement by the transfer of the Sudeten-Germany territory to the Reich.⁶

Weigand writes in his analysis:

Die Wendung (in Artikel I) "als nichtig betrachten" macht den Willen der Parteien deutlich, über die Ungültigkeit des Münchener Abkommens nach eigenen Bedürfnissen autonom zu bestimmen und sie nicht einer allgemeinen abstrakten Norm des Völkerrechts zu unterwerfen. Demzufolge geben die Vertragspartner hier nicht lediglich deklaratorisch eine unbeeinflussbare Rechtsfolge wieder. Vielmehr ordnen sie selbst konstitutiv Rechtsfolgen für ihre Zwecke an.

Weder die deutsche noch die tschechoslowakische Nichtigkeitsthese wird bestätigt. Eine generelle Aussage bleibt dahingestellt. Man hat sich entsprechend den Erfordernissen und im Rahmen eines konkreten Vertrages geeinigt.

Referring to the formulation "as provided by this treaty", he states:

Neben dem "Ob" behielten sich die Bundesrepublik und die Tschechoslowakei auch das "Wie" der Nichtigkeit zur Entscheidung vor. Gegenstand und Ausmass einer modifizierten Nichtigkeit sind dem Vertrag selbst zu entnehmen.

Art. II des Vertrages schliesst alle diejenigen rechtlichen Folgerungen aus, die aus einer absoluten Nichtigkeit des Münchener Abkommens gezogen werden könnten und für die Bundesrepublik inakzeptabel gewesen wären.

6. v. Richthofen, Der Vertrag zwischen Bonn und Prag, loc.cit., pp. 46; Denkschrift der Bundesregierung zum Vertrag, BT-Drucksache 7/1832, G.d.B., p. 14.

The author gives this comment "with regard to their mutual relations":

Endlich haben die Parteien eine Abrede getroffen hinsichtlich der Erstreckung ihrer Ungültigkeitsvereinbarung.

Die Einigkeit bezieht sich ausdrücklich nur auf das gegenseitige Verhältnis und lässt die Position anderer Staaten unberührt.

Gegenüber den weiteren Signataren des multilateralen Münchener Abkommens, Grossbritannien, Frankreich und Italien, besteht gar keine Alternative.⁷

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7. Weigand, Der Vertrag über die gegenseitigen Beziehungen zwischen der Bundesrepublik Deutschland und der Tschechoslowakischen Sozialistischen Republik vom 11. Dezember 1973 - Eine völkerrechtliche Analyse, p. 68-9. E.t.: The phrase (in article I) 'to consider as void' gives a clear indication of the intention of the parties to determine independently, as the need arises, the nullity of the Munich Agreement and not to subject it to the general abstract rule of international law. Thus, the contracting parties are not simply making a declaration concerning the influenceability of a legal effect. On the contrary, they themselves basically set out legal effects for their own ends.

Neither the German nor the Czechoslovak nullity theory is being confirmed. A general statement is left wanting. An agreement corresponding to the exigencies was reached within the scope of an actual treaty.

Besides the 'if', the Federal Republic and Czechoslovakia reserved themselves also the decision of the 'how' with regard to the question of nullity. The object and extent of a modified nullity may be deduced from the treaty itself.

Article II of the treaty excludes all those legal consequences which could ensue from the nullity of the Munich Agreement, and which would have been unacceptable to the Federal Republic.

The parties have at last reached an understanding concerning the extent of their agreement on the question of nullity.

The agreement refers expressly only to the mutual relationship, leaving the position of other countries untouched.

No alternative exists with regard to the other signatories of the Munich Agreement, Great Britain, France, and Italy.

Colard explains:

Trois observations s'imposent ici. Il s'agit d'une formule vague et très "élastique" qui ne prend pas position sur le fond: nullité ab initio, nullité absolue ou nullité relative. Il y a bien annulation mais sans qu'une limite dans le temps soit précisée. En second lieu, la nullité vise les relations mutuelles germano-tchécoslovaques uniquement...chaque Etat étant libre de s'en tenir à sa propre interprétation... En troisième lieu, la nullité est réglementée, c'est-à-dire subordonnée à certaines conditions qui font l'objet de l'article 2 et de documents annexes.⁸

Frowein takes the view that faced with the treaty's concrete provisions, all arguments derived from an abstract interpretation of nullity must be excluded.⁹

It is now necessary to go into consider the most important legal points of the Treaty are:

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8. Colard, Le traité de normalisation germano-tchécoslovaque du 11 décembre 1973, end.c. p. 674. E.t.: Three observations suggest themselves: It is a matter of a very vague and very "elastic" formula, which takes no position on: nullity ab initio, absolute nullity or relative nullity. It is, on the contrary, an annulment, but without defining a limit in time. In the second place, the nullity aims solely at German-Czechoslovak mutual relations. ...Each State has reserved to itself freedom to maintain its own interpretation (of the treaty)...Thirdly the nullity is regulated i.e. subordinated to particular conditions which are the object of Article 2 and the documents in the annex.
 9. Frowein, Zum Begriff und den Folgen der Nichtigkeit von Verträgen im Völkerrecht, loc.cit. p. 115.

Article I of the Treaty, whose extent becomes apparent only after detailed examination, contains a sufficient safeguard against the theory of the ab initio nullity of the Munich Agreement. The first such safeguard lies in the fact that in this Article the parties jointly declare that the Munich Agreement is to be considered null and void. The legal position is thus left open, and it is pointed out that the joint decision concerning the nullity of the Agreement relates to the future. Moreover, the designated date, i.e. of September 29, 1938 (on which France, Great Britain, Italy and Germany signed the actual Agreement concerning the conditions and modality of the cession of the Sudeten territories) makes it evident that the previous legal acts, such as the French and British exchange of notes with Prague and the later German-Czechoslovak treaties concerning the transfer of sovereignty, are not included. The formulation "with regard to their mutual relations" makes it plain that the declaration of nullity of the Agreement is strictly bilateral and that it does not affect the legal position of other signatories. The fourth restriction is to be seen in the formulation that the Agreement is null and void as provided by this treaty.

Furthermore, the Treaty fails to mention either the incompatibility of the Munich Agreement with the territorial ownership guarantee contained in Article 10 of the League

of Nations Covenant, nor the guarantee with respect to the remainder of Czechoslovakia promised, but not actually delivered, by the German Reich in a supplementary agreement to the Munich Agreement. The Treaty also fails to mention what some authors have read into the Nuremberg Judgement, namely that the reason for the nullity lay in Hitler's lack of intention to observe the agreement.

Czechoslovakia's principal argument for the Agreement's "invalidity" from the beginning is mentioned in the preamble to the Treaty,¹⁰ both parties recognizing that the

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10. The preamble - an integral part of the treaty- goes beyond the usual political-ideological character of a preface. Its legal importance must also be classed higher than as if it were just a medium for interpreting the treaty. The preamble, rather, has opened up the convincing possibility of seeing article 1 of the treaty in the proper perspective.

Also Blumenwitz refers to it aptly when he states: "In der tschechoslowakischen Vertragsinterpretation nimmt die in Abs. 3 der Präambel erfolgte gemeinsame Verurteilung des Münchner Abkommens als Gewaltakt eine Schlüsselrolle ein" (Blumenwitz, Zur Nichtigkeit des Münchener Abkommens vom 29. September 1938 - Analyse der Nichtigkeitsformel und ihre rechtlichen Konsequenzen, Jahrbuch 1975, p. 182). E.t.:

In the Czechoslovak interpretation of the treaty, the joint condemnation of the Munich Agreement as an act of force contained in paragraph 3 of the preamble, assumes a key position.

The Federal Government, nevertheless, exercised the utmost discretion when declaring in its memorandum to the treaty (BT-Notice 77/74 of January 25, 1974, p. 11) that the preamble contained nothing more than a pure statement of fact.

Munich Agreement of September 29, 1938 was imposed on the Czechoslovak Republic by the National-Socialist regime under the threat of force.

The Czechoslovak point of view that the Munich Agreement was concluded without Czechoslovakia's participation is also taken into consideration, but reference is made only to the Agreement of September 29, 1938, i.e. the Munich Agreement in the restricted sense. That the Agreement was concluded without the participation of Czechoslovakia cannot be disputed.¹¹

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11. Bretton, in Les négociations germano-tchécoslovaque sur l'accord de Munich du 29 septembre 1938, (end.c. p. 208-9) wholly supports the solution to the nullity question contained in the normalization treaty when he writes: "Si l'on comprend bien que des considérations politiques justifient que cet accord (de Munich) puisse être déclaré inexistant, il n'en demeure pas moins qu'on ne peut faire abstraction de la portée d'une annulation rétroactive de ses conséquences juridiques. ...c'est au nom du réalisme que (par) les négociateurs ouest-allemands...un compromis a pu être trouvé, ...en faisant valoir, que cet accord (de Munich) a été élaboré sans sa participation (celle de la Tchécoslovaquie) et contre sa volonté."

E.t.: If it is to be understood that political considerations would have justified this agreement (of Munich) being declared non-existent, then, by the same token, one would have been inclined to undertake a retrospective annulment with all its legal consequences. ...it is a credit to reality that the West German negotiators...were able to work out a compromise formula, ...which showed that this agreement (of Munich) was elaborated without their (the Czechs) participation and against their will.

The German legal position, however, is based on the British-French-Czechoslovak arrangements of September 19 and 21, 1938 on the Czechoslovak submission of September 30, 1938, and, finally, on the negotiations within the International Commission and the subsequent fulfillment of the terms of the Munich Agreement. The Treaty concluded in 1973 does not mention these incontestable facts.

The Czechoslovak standpoint, though, is taken into account by reason of the recognition that the Munich Agreement is void and by the acknowledgment of the two principal reasons by which Czechoslovakia supports her argument of "invalidity" from the beginning".

Thus, it appears that the German position is compromised. The results of the negotiations of September 19 and 21, 1938 between France, Great Britain and Czechoslovakia and the actual situation prevailing after September 29, 1938, for example, are not mentioned. However, the German interests are embodied in Article II of the Treaty, where all juridical inferences logically following from the thesis of the Munich Agreement's voidness "from the beginning" are precluded.¹² In this

12. v. Richthofen (f.n.6), p. 47; Europa-Archiv, 1974, D 57.

manner, the Czechoslovak argument of invalidity ex tunc loses force. Both parties have agreed that the legal effects are the same no matter when the Munich Agreement became invalid.

To this end Article II, paragraph 1 provides that:

the treaty shall not affect the legal effects on natural or legal persons of the law as applied in the period between September 30, 1938 and May 9, 1945.

It provides further (paragraph 2) that,

...the treaty shall not affect the nationality of living or deceased persons ensuing from the legal system of either of the two Contracting Parties.

And finally (paragraph 3),

the...treaty, together with its declarations on the Munich Agreement, shall not constitute any legal basis for material claims by the Czechoslovak Socialist Republic and its natural and legal persons.

Weigand points out:

Hoheitsakte, von deutschen Behörden im Sudetenland zwischen dem 30. September 1938 und Kriegsende vollzogen, behalten gemäss Art. II Abs. 1 des ...Vertrages ihre Gültigkeit.

Den in den Wehrdienst und sonstigen öffentlichen und Staatsdienst des Deutschen Reiches eingegliederten Sudetendeutschen kann nicht Landesverrat und Kollaboration mit der deutschen Besatzungsmacht vorgeworfen werden.

Auch die in jener Zeit ergangenen Straf- und privatrechtlichen Gerichtsurteile und - beschlüsse bleiben nach wie vor irreversibel.

Eine "Rückabwicklung" all dieser Rechtswirkungen wäre schon aus praktischen Gründen unvorstellbar und würde zu unüberbrückbaren Schwierigkeiten führen.

Dasselbe gilt in besonderem Masse für Sachverhalte auf dem Gebiete des Personenstands wesens.

Die nachträgliche Ungültigkeit z.B. einer nach deutschem Recht geschlossenen Ehe hätte in der Regel ausserordentlich weitreichende Konsequenzen u.a. für Verwandtschaftsverhältnisse und bis hin zu erbrechtlichen Fragen. Sie würde eine Welle von Folgeerscheinungen auslösen. Festgefügte familienrechtliche Bande würden ohne tieferen Sinn zerstört, allgemeine Verwirrung gestiftet.¹³

With regard to the Treaty provisions, it can be confirmed that the objective of the Federal Government to settle the problems of the past, in particular the issues arising from the Munich Agreement, in a manner

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13. Weigand (f.n.7), p. 77. E.t.: According to Article II para 1 of the ...treaty acts of sovereignty committed by German authorities on Sudeten territory between September 30, 1938 and the end of the war, remain valid.

Sudeten Germans who joined the army or were engaged in other public or governmental services of the German Reich, cannot be accused of treason or collaborating with the German occupation forces.

Also all those criminal and civil judgements and court decisions given during that time remain unchanged.

A 'reversal' of all these legal effects would be unimaginable simply for practical reasons, and would lead to insurmountable difficulties.

The same can be said with particular reference to questions concerning people's status.

The subsequent nullity of, e.g., a marriage concluded under German law would have wide-ranging consequences, among others, for family relationships and questions of inheritance. It would trigger off a series of side-effects. Solid family ties would be senselessly destroyed, and general confusion would ensue.

which allowed for the defence of the vested interests of both parties, was achieved.¹⁴

The objections of the Federal Council¹⁵ with regard to the settlement reached in the Treaty concerning the invalidity of the Munich Agreement are not supportable. As a rebuttal of the argument that West Germany's interests were not sufficiently taken into account, it must be emphasized that no deliberate attempt was made to reconcile all outstanding differences between the two Parties in order to salvage the Agreement. Each State has disclaimed that its legal standpoint was incorporated into the Treaty.¹⁶ Instead, the contracting Parties left for the future the resolution of any problems resulting from the Munich Agreement.¹⁷

The Minister of Foreign Affairs stated at the meeting of the Federal Council on March 8, 1974:

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- 14. BT-Drucksache 7/1832, G.d.B. of March 20, 1974, p. 1.
 - 15. Anlage (enclosure) 2, BT-Drucksache 7/1832, G.d.B., p. 18.
 - 16. For further information see the Statement of the Federal Minister of Foreign Affairs in his report concerning the 90th meeting of the German FD, March 27, 1974 (BT-Drucksache 7/1832, Tz. 60070).
 - 17. Anlage (enclosure) 3, BT-Drucksache 7/1832, G.d.B. p. 19.

Der Vertrag ist in die Zukunft gerichtet. Wo er auf schwerwiegende Rechtsfragen einer unheilvollen Vergangenheit eingeht, sucht er nicht die Geschichte Mitteleuropas neu zu schreiben. Vielmehr wurde hier unausweichliche Aufräumarbeit geleistet.¹⁸

The contracting parties agreed (not expressis verbis) on a legal position which in principle existed in international law. In this way the German legal standpoint was sufficiently protected. The explicit recognition that the invalidity of the Munich Agreement arose after its conclusion was therefore unnecessary.

Further, the criticism of the Federal Council that the preamble of the Treaty made reference only to the fact that the Munich Agreement was forced upon Czechoslovakia by threat of force, but was silent on the fact that the right of self-determination was refused to the Sudeten Germans, did not result in the rejection of the Treaty as a whole. The Federal Government rightfully emphasized, in refuting this objection, that the aim of the Treaty was not to demonstrate chronologically the causes and effects of the development of German-Czechoslovak relations. The

18. Bundesrat (FC), Bericht (report) of the 402nd meeting (8.3.1974), BR-Drucksache, Tz. 60 C, D. E.t.: This treaty is directed to the future. Where it concerns the difficult legal questions of a past full of calamity, it does not try to write anew the history of Central Europe. Rather, the parties concentrated on solving current problems.

Government did not find it necessary to point out that the refusal of self-determination for the Sudeten Germans did not represent the beginning of German-Czechoslovak relations; rather, this development was preceded by centuries of suppression of the Czech people by the Germans and Magyars in the Danubian Monarchy.

Finally, the Federal Council saw in the formula with the wording, that the determined intention

to put an end once and for all to the disastrous past in their relations, especially in connection with the Second World War, which has inflicted immeasurable suffering on the peoples of Europe,

an interpretation which justified the expulsion of the Sudeten Germans and the confiscation of their property. The Council felt that a clarification was necessary to the effect that the rights of the expellees would not be affected by the Treaty and that a final arrangement still had to be made.

Thus, the representative of the CDU/CSU party explained during the debate concerning the veto of the Federal Council on July 10, 1974:

Die damalige Bundesregierung wird jedenfalls den schwerwiegenden Vorwurf nicht entkräften können, dass sie kein Wort in den Vertrag selbst hineingebracht hat, mit dem auch die Völkerrechtsverletzungen der Vertreibung von mehr als dreieinhalb Millionen Menschen angesprochen wäre. ...Leider aber wissen wir, dass das Verschweigen der Vertreibung der Sudetendeutschen aus ihrer

angestammten Heimat als eine Legitimierung nicht nur verstanden werden könnte, sondern jenseits der Grenze auch so verstanden wird.¹⁹

This interpretation of the legal situation by the opposition leaders can not be approved. Two neighbouring peoples who inflicted sufferings on one another for a millenium cannot achieve peace so long as they continue to enumerate the injustice of the past. They must turn over a new leaf. Certainly, when it is expressed in the Treaty that both States want to overcome the burden of the past, this cannot be interpreted to mean that the contracting parties approve of all that happened in the past. It is not in the spirit of new relations between these two countries to accuse one another of atrocities, especially since such atrocities were committed on both sides.²⁰

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19. BT-Drucksache 7/2325, Tz. 7638 B, C.
E.t.: The former Federal Government will in any case not be able to refute the accusation that they failed to mention in the Treaty the violation of provisions of international law resulting from the expulsion of more than three and a half million people...Unfortunately we know that silence on the question of expulsion of the Sudeten-Germans from their ancestral domicile can not only be, but on the other side of the border also is understood as a legitimation of this expulsion.
 20. In the name of the Federal Government the Parliamentary State Secretary in the German Foreign Office, Herr Moersch, explained that the Federal Government believed that the historical settling of accounts would achieve nothing (BT-Drucksache 7/1013). This was in response to an inquiry from a member of the Parliament, Herr Becher (CDU/CSU) whether the Federal

The Federal Council's reproach that the Treaty did not mention concessions made by the German side is false, since no unilateral concessions were expressed. If the Federal Government recognize, as they do, the present invalidity of the Munich Agreement they simply concur in an opinion shared by all States in the world. This does not constitute a concession. The recognition of the fact that the Munich Agreement was forced upon Czechoslovakia by threat of force is also not a concession but merely the recognition of an incontestable historical truth. Finally, the resolve to overcome the past is not a unilateral but a mutual concession. The treaty gives both peoples the opportunity to begin anew their relations.²¹ The alternative to such a settlement would have been the revengefulness which led to the massacres in Czechoslovakia (on both sides) during and after the war. This is precisely the feeling that has to be eliminated.

Government had demanded from the Czechoslovak Government no list of persons who were responsible for ...mass executions and other crimes...during the period of expulsion. Moersch said, if we had demanded the publication of such a list of names, we could not resist a counterclaim for a corresponding list of names for proceedings within the competence of the German side until 1945.

21. Bericht und Antrag des Auswärtigen Ausschusses des Bundestages (Report and motion of the Foreign Committee of the FD), BT-Drucksache 7/2270, p. 5.

The legal question of the invalidity of the Munich Agreement ab initio or ex nunc, thus, did not find in the Treaty of 1973 a pure juridical solution (in the sense of dogmatic clearness) but a practical answer²²

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22. Seidl-Hohenveldern appropriately writes: "Schlüssig lässt sich weder die These des CSSR von der ex tunc Nichtigkeit noch die der Bundesrepublik Deutschland von der anfänglichen Gültigkeit eines erst später ungültig gewordenen Münchener Abkommens beweisen. Über den Zeitpunkt dieser, also möglicherweise erst später eingetretenen Ungültigkeit besteht Unklarheit. Trat sie mit der Unmöglichkeit der Erfüllung des Garantieverprechens bei der Besetzung der Rest-Tschechoslowakei im März 1939 ein oder mit der Festlegung der in Ausübung der obersten Regierungsgewalt in Deutschland handelnden Alliierten auf die deutschen Grenzen nach dem Stande vom 31. Dezember 1937 in der Berliner Erklärung vom 5. Juni 1945 - oder gar erst mit der Regierungserklärung der Regierung Kiesinger 1966, dass "das unter Androhung von Gewalt zustande gekommene Münchener Abkommen nicht mehr gültig ist" (Seidl-Hohenveldern, Das Münchener Abkommen im Lichte des Prager Vertrages von 1973, loc.cit. p. 457).

E.t.: There is no definite proof to support either Czechoslovakia's thesis of the ex tunc nullity, nor that of West Germany according to which the Munich Agreement was initially valid until it became null and void at a later date. There is uncertainty concerning the point in time at which the nullity may subsequently have set in. Did it set in when the promised guarantee could not be fulfilled due to the occupation of the remaining Czechoslovak territory in March 1939, or when in the Berlin Declaration of June 5, 1945 the Allies - who were exercising the supreme governing authority in Germany - changed the German frontiers to what they were on December 31, 1937; or did it set in as late as 1966 with the Government Declaration of the Kiesinger Government which read that "the Munich Agreement which came into being as a result of duress is no longer valid."

which does not burden the relations of the two States.²³
Therefore, the contracting states came to terms over the most sensitive part of the Agreement.

Blumenwitz arrives at the following conclusion:

Dass der Regelung der Nichtigkeit des Münchner Abkommens...im deutsch-tschechoslowakischen Vertrag...eine ganz hervorragende Bedeutung zukommt, ergibt sich bereits aus der Präambel... Für die rechtliche Bewertung der hier anstehenden Frage ist...Art. I des Vertrages sedes materiae. Für die Bundesrepublik ergibt sich hieraus folgender Rechtsstandpunkt:

1. Das Münchner Abkommen vom 29. September 1938 hat in Verbindung mit weiteren völkerrechtlichen Akten zunächst zu einer völkerrechtlich wirksamen Abtretung der Sudetengebiete an das Deutsche Reich geführt, das bis zum 9. Mai 1945 die Gebietshoheit über dieses Gebiet ausübte.

2. Durch welchen völkerrechtlichen Akt die Gebietshoheit auf den neu konstituierten tschechoslowakischen Staat zurückfiel und ob der durch den Vertrag vom 11. Dezember 1973 bestätigte Besitzstand noch einer weiteren völkerrechtlichen Legitimierung bedarf, bleibt wie bei den übrigen Ostverträgen offen.

Von ganz entscheidender Bedeutung ist...die Beschränkung der Nichtigkeit in Art. I des Vertrages auf die gegenseitigen Beziehungen der beiden Vertragsstaaten. Die grundsätzlich gegenüber jederman wirkende Nichtigkeit wird nur im

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23. In spite of the Czechoslovak standpoint of voidness ab initio, Article II, paragraph 2 of the Treaty determines that the nullity of the Munich Agreement shall affect the legal effects of natural or legal persons of the law as applied in the period between September 30, 1938 and May 9, 1945. In spite of the nullity of the treaty, actions of the German organs of state vis-à-vis natural or legal persons are valid by reason of the contractual cession of territories, excluding the effects of measures which both contracting parties deem to be void owing to their incompatibility with the fundamental principles of justice.

Hinblick auf die Beziehungen Bundesrepublik/CSSR klargestellt...Aus der Beschränkung der Nichtigkeit auf die gegenseitigen Beziehungen lässt sich auch allgemein das Gebot zur restriktiven Auslegung der Nichtigkeitsformel ableiten. Dies ergibt sich auch daraus, dass das Münchner Abkommen auch in den gegenseitigen Beziehungen der Vertragsparteien nicht schlechthin, sondern nur "nach Massgabe dieses Vertrages" nichtig sein soll.²⁴

24. Jahrbuch 1975, p. 245-6.

E.t.: That it is possible to deduce already from the preamble...that special importance must be attached to the provision concerning the nullity of the Munich Agreement contained in the German-Czechoslovak treaty. Sedes materiae for the legal assessment of the issue which has arisen here is ...Article 1 of the Treaty. For the Federal Republic of Germany this gives rise to the following legal standpoint:

1. The Munich Agreement from September 29, 1938 -together with other acts of international law- at first caused the Sudeten territories to be effectively (in the eyes of international law) transferred to the German Reich which exercised its sovereignty over this territory until May 9, 1945.

2. The question of which act of international law returned the territorial sovereignty of the newly formed Czechoslovak state and whether the ownership status confirmed by the treaty of December 11, 1973 requires a further legitimation of international law, remains, as in the case of the other East Treaties (Ostverträge), an open one.

Of decisive importance is...that in Article 1 of the treaty the nullity is limited to the mutual relations of the two signatories. The nullity, which is basically effective vis-à-vis all persons, is clarified only as regards the relations Federal Republic/Czechoslovakia...From the limitation of the nullity one can also deduce the general rule for interpreting the nullity formula. This is due to the fact that also what concerns the mutual relations of the parties to the treaty, the Munich Agreement is supposed to be void only "under the present treaty" and not in general.

Raschhofer²⁵ emphasizes that the relative view of nullity, as agreed upon in the Treaty, allows each party to adhere to opposite legal interpretation of the Munich Agreement.

The memorandum forwarded by the Federal Government to the Federal Diet and the Federal Council states:

Diese Übereinkunft stellt nicht die von der CSSR ursprünglich geforderte Erklärung der Ungültigkeit des Münchner Abkommens von Anfang an mit allen sich daraus ergebenden Konsequenzen dar. Und weiter: Es wird weder festgestellt, noch von der Bundesregierung Deutschland anerkannt, dass das Münchner Abkommen nichtig oder von Anfang an ungültig gewesen sei, vielmehr bringen bereits die Worte "sind übereingekommen" und "betrachten als nichtig" zum Ausdruck, dass die gefundene Übereinkunft lediglich auf die beiden Vertragspartner bezogen sind und dass sie nicht zurückwirkt, sondern für die Zukunft vom Tage des Inkrafttretens des Vertrages an gelten wird.²⁶

25. Raschhofer, Der deutsch-tschechoslowakische Normalisierungsvertrag, loc.cit. p. 136.

26. BR-Drucksache (Government publication) 77/74, January 25, 1974, p. 11.

E.t.: This agreement does not represent the statement originally demanded by Czechoslovakia declaring the Munich Agreement void right from the beginning, with all the ensuing consequences. Furthermore: neither does the German Federal Government acknowledge, nor does it state, that the Munich Agreement was void or void from the very beginning. On the contrary, the words "have agreed" and "consider as void" rather express that the understanding reached affects only the two parties to the Treaty, and that its effect is not retrospective but valid for the future from the date of the treaty coming into force.

Chnoupek, the Czechoslovak Prime Minister
declared in June 1973:

"The main political and legal importance of the treaty lies in the fact that it confirms that the frontier territories, taken away by force from Czechoslovakia, legally never belonged to the German Reich."²⁷

Even if one wanted to see therein under the contracting parties a far-reaching dissent of legal nature concerning form and substance of nullity of the Munich Agreement, it would have no particular meaning, since the parties put the legal effects of the void legal transaction into a concrete form by means of other provisions, especially in Article II of the Treaty.

The following articles of the Treaty are also of far-reaching importance.

In Article III of the Treaty the contracting parties bind themselves to observe the aims and principles embodied in the Charter of the United Nations. Since both the CSSR and the Federal Republic are Member-States of the UN, this obligation is binding in any case.²⁸ After all, this general obligation becomes an additional, namely a contractual, obligation between the partners as well by reason of Article III.

27. Rude Pravo of June 21, 1973 (Bretton, end.c. p. 197).

28. Dahm, Völkerrecht, Bd. 2, p. 357; Strupp-Sehlochauer, Wörterbuch des Völkerrechts, Bd. 3, p. 500.

This could be termed a case of concurrent claims between a multilateral treaty, in the form of the United Nations Charter, and a bilateral treaty, as the one signed by the parties. It is comparable to concurrent treaties recognized in international law, i.e., the meeting of provisions contained in international treaties concluded by a subject of international law with the same subject of international law or with a different subject of international law, and which refer to the same subject-matter.

Article IV of the treaty embodies a regulation which guarantee the common frontier of the two States and which excludes any territorial claims of the Federal Republic against the CSSR or vice versa.²⁹

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29. Professor Münch stated during the symposium of the University of Kiel 1972 (see Kimminich-Rumpf, loc. cit. p. 109-113): "Die in Wien geschlossene Konvention über das Recht der Verträge vom 23. Mai 1969 erkennt an, dass es zwingendes Völkerrecht gibt, an dem die Gültigkeit völkerrechtlicher Verträge zu messen ist. Verträge, die gegen zwingendes Recht verstossen haben, sind ab initio nichtig (Art. 53); Verträge, die mit später entstandenem zwingendem Recht kollidieren, werden nichtig (Art. 64).

Dieser Vertragsrechtskonvention müsste in der Betrachtung der Ostverträge nicht gedacht werden, wenn sie lediglich auf zukünftige Verträge anwendbar wäre. Denn es ist anzunehmen, dass die Ostverträge... eher in Kraft treten als die Vertragsrechtskonvention ...

Aber wie alle Kodifikationstexte schliesst dieser nicht die Möglichkeit aus, seine Bestimmungen als älteres Völkerrecht anzusehen. Sein Art. 4 behält sogar ausdrücklich die Möglichkeit vor, die Regeln unabhängig von der Konvention auf Verträge anzuwenden. ...

Die Partner der Ostverträge sind der Lehre vom zwingendem Völkerrecht verbunden, und deshalb hat sie in ihren Beziehungen eine besondere Bedeutung... .

Wir haben es bei unserem Thema...zu tun mit... der Selbstbestimmung der Bevölkerung im Falle einer Grenzünderung. ...

Die Ostverträge verstossen gegen dieses Selbstbestimmungsrecht, weil die...in die Ostgebiete gehörige, durch kriegsrechtswidrige Vertreibung und Fernhaltung nur de facto abwesende Bevölkerung nicht zu der Losreissung von Deutschland gehört wird."

E.t.: The Convention on the Law of Treaties, which ended in Vienna on May 23, 1969, recognises that there exists international jus cogens which must serve as the yardstick when determining the validity of international treaties. Agreements which go counter to jus cogens are void ab initio (Art. 53); agreements conflicting with later jus cogens become void (Art. 64).

When considering the Ostverträge, this convention on treaty law ought not to be referred to if it is solely applicable to future treaties, since one goes from the assumption that the Ostverträge...come into effect prior to the convention on treaty law. ...

However, like all codification texts, the latter does not exclude the possibility of treating its stipulations as older international law. Its Art. 4 reserves even the possibility of applying the rules to treaties independently from considerations arising from the convention.

The parties to the Ostverträge are bound by the doctrine of international jus cogens, giving it a particular meaning in their relations. We are dealing in our case...with the self-determination...of the people in the event of a change in the frontiers....

The Ostverträge violate the right to self-determination because, due to their unlawful expulsion and prevention from returning, the simply de facto absent people are not given a hearing by Germany with regard to the enforced separation.

Professor Münch comes to the conclusion that the frontier clauses of the Ostverträge violate the right to self-determination of the people concerned and recognise an annexation which violates international law.

Under both aspects they are confronted by jus cogens. The result thereof is the voidness of the treaties in the sphere of international law (loc. cit. p. 113).

In the discussion (loc.cit. p. 156) Professor Menzel replied:

"Sie haben...behauptet, wenn die Ostverträge ratifiziert sein werden und wenn dann die Wiener Vertragskonvention mit der jus cogens-Klausel in Geltung tritt und auch die Bundesrepublik sie ratifiziert haben wird, dann würde sich rückwirkend die Möglichkeit ergeben, die Territorialklauseln der Ostverträge wieder zu beseitigen, weil sie gegen jenes jus cogens verstießen. Und sie haben erkennen lassen, dass noch ganz andere Verträge dann nichtig werden würden. Es hatte fast den Anschein, als wollten Sie mit Hilfe der jus cogens-Kennzeichnung des Selbstbestimmungsrechts die territorialen Entscheidungen der letzten 100... Jahre rückgängig machen. ...Das wird nicht geschehen, auch nicht gegenüber den Ostverträgen. Man braucht sich nicht einmal auszumalen, wie das Selbstbestimmungsrecht praktisch rückwirkend angewendet werden soll, um in der Überzeugung bestätigt zu werden: Dies wird sich nicht ereignen."

E.t.: You...have stated that once the Ostverträge have been ratified, and the Vienna treaty convention with its jus cogens clause has come into force, and the Federal Republic has also ratified them, there would then be a retrospective possibility to have the territorial clauses in the Ostverträge removed on the grounds that they infringe the jus cogens. You have, further, indicated that this would cause other treaties to become void. It would almost appear as if you were trying to rescind the territorial settlements of the last 100...years with the aid of the jus cogens label on the rights to self-determination. ...This will not happen, not with regard to the Ostverträge either. It is not even necessary to imagine how the right to self-determination should be retrospectively applied in practice in order to be confirmed in one's belief: this will not happen.

The centuries-long quarrel between Germans and Czechs is settled by Article IV in which Germany renounces the claim to territory which was for centuries inhabited by Germans. Although the Federal Republic of Germany has not sanctioned the expulsion of her ethnic groups from their ancestral domains, she has accepted the situation created by the expulsion of the Germans, and Czechoslovakia has been relieved of her most pressing problem. It must be pointed out that Article IV precludes only the territorial claims of the Federal Republic herself and not the claims of the expellees with regard to their private real-estate (especially in the Sudetenland) or with regard to compensation for its confiscation. This provision is not to be read as legitimizing expulsion or expropriation.

Finally, in Article V the contracting parties agree that expansion of their co-operation in the realms of economics, science, culture, environmental protection, sports, transportation and other areas will benefit their common interest. The importance of this Article depends on the States' efforts to fulfill it. Presently, it is merely a proposal to which both parties have voiced assent.

2) The Settlement of Problems Resultant from
the Basic Conception of the Treaty

a) Questions concerning Nationality

General principles of the law of nationality are:

1. It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

2. Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

3. A person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.³⁰

When a territory passes from one State to another, the question of the change of nationality arises. The modern trend is to regulate this question by special provision. Under international law the nationals of the State which cedes territory who live in the territory ceded become eo ipso citizens of the State to which the territory is ceded.³¹

30. See Draft Convention on certain questions Relating to the conflict of Nationality Laws, The Hague 1930 (League of Nations Doc. C.24. M 13. 1931. V., Articles 1-3).

31. Lauterpacht, International Law, Vol. I, p. 551.

Accordingly the citizens in the local territory lose in principle their old nationality and acquire ipso jure the new nationality of the acquirement State. General State practice has introduced three legal institutes which seem suitable to mitigate the transition for the persons concerned. For one thing, in some cases a plebiscite of the population concerned is provided, which can be agreed upon by the contracting States from case to case. Frequently possibilities of option are created in order to give those nationals who want to remain faithful to the old State the opportunity to opt for its citizenship. Regarding persons remained in the local territory who did not opt and who then regularly emigrate, there are frequently provisions for the protection of minorities as for example laid down in the Agreement of the Allied and Associated Powers with Czechoslovakia of September 10, 1919.³²

Brownlie explains:

When a state succession occurs, the affected population normally will automatically acquire the nationality of the successor state. However, liberal sentiment and the influence of the principle of self-determination have led some writers to assert a right of option. It is certainly true that many treaties of cession provide rights of option, but their existence may militate against the view that general international law recognizes such a right.³³

32. See Part I, f.n.6 of the thesis.

33. Brownlie, Principles of Public International Law, 2^d ed., p. 540.

The United Nation's draft Conventions on the elimination of future statelessness, respectively on the reduction of future statelessness of 1954 state in their identical articles 10:

1. Every treaty providing for the transfer of a territory shall include provisions for ensuring that, subject to the exercise of the right of option, the inhabitants of that territory shall not become stateless.

2. In the absence of such provisions, a State to which territory is transferred, or which otherwise acquires territory, or a new State formed on territory previously belonging to another State or States, shall confer its nationality upon the inhabitants of such territory unless they retain their former nationality by option or otherwise or have or acquire another nationality.³⁴

The questions of nationality with regard to the inhabitants of Czechoslovakia rank among the most complex.

By virtue of the Munich Agreement territories were handed over to the Reich which were populated predominantly by Germans but in which there were also Czechs and Slovaks. By the annexation of the rest of Czechoslovakia in March 1939, Czech nationals who were considered members of the German race obtained German nationality. When Czechoslovakia was restored at the end of the war, the Czechoslovak Government was not willing to restore Czechoslovak nationality to those persons who had become citizens of the Reich; on the

34. UN Doc. A/2693, pp. 3-7.

contrary the Government expelled more than three million of these inhabitants. Neither the German Reich nor Czechoslovakia with regard to the triple change of territory contented itself with the afore-mentioned principle of international law but, rather, settled the questions of nationality by statutes or agreements. In general terms at least, these problems must be discussed.

The questions of citizenship which derived from the Munich Agreement of 1938 were settled in the Treaty between the German Reich and the Czechoslovak Republic on Questions of Nationality and Option of November 20, 1938.³⁵ This Agreement did not deal with the ethnic affiliation of the population living there, but concerned itself with determining those born in the ceded territory before January 1, 1910; further those descended from persons who were born there before that date and, finally those who had lost their German citizenship on January 10, 1920, including their descendants; finally wives of persons to whom the provisions of the Treaty could be applied.

By virtue of this Agreement all segments of the established population of the ceded territory became German nationals, including the indigenous Czechoslovak minority.

35. Document No. 7. Even before this Treaty became effective, Hitler, by means of the Law on the Reunion of the Sudeten-German Territories with the German Reich (Document No. 8), had stated the principle that the old-established inhabitants of these territories were German citizens.

However, under Article 3 of the Treaty they were allowed to opt for Czechoslovak nationality. Conversely, a right of option for German nationality was conceded to the ethnic Germans who remained Czechoslovak nationals, especially to the German minority in the rest of Czechoslovakia.

In the acquisition of German citizenship ethnic affiliation was decisive only for those Czechoslovaks who, on October 10, 1938, had had their residence outside the former Czechoslovak territory. They acquired German citizenship only if they forfeited their Czechoslovak citizenship and if they were ethnic Germans who on this day possessed the right of domicile in a Sudeten German community.³⁶ Furthermore, the German Government could request that non-ethnic Germans, who under the Treaty retained Czechoslovak citizenship (especially those Czechs and Slovaks who had immigrated into the ceded territory after January 1, 1910), leave the German Reich within three months. Likewise, the Czechoslovak Government could request that ethnic Germans, who possessed Czechoslovak citizenship and had immigrated into Czechoslovakia after this date, leave Czechoslovakia within three months, whereupon they could lose Czechoslovak citizenship.

This settlement was in accordance with international law³⁷ recognized at that time.

36. Schmied, Das Staatsangehörigkeitsrecht der Tschechoslowakei, p. 23.

37. Lauterpacht (f.n.31), Vol. I, pp. 552-4; O'Connell, International Law, Vol. I pp. 454-5.

When Hitler annexed the remaining territory of Bohemia and Moravia, and Slovakia became a separate State, he deviated from his racial program by incorporating non-German peoples into the German Reich. But he was not willing to grant the same rights to the Czechs as to Germans. Article II of the Decree on the Protectorate of Bohemia and Moravia provides, that

inhabitants of the Protectorate of German race shall become German nationals and German citizens in accordance with the provisions of the Reich Citizenship Law of September 15, 1935. ...The remaining inhabitants of Bohemia and Moravia shall be nationals of the Protectorate of Bohemia and Moravia... .38

The citizenship of the Protectorate was something quite new, something between German nationality and a nationality sui generis. Since the Protectorate was a part of the German Reich, the citizens of the Protectorate were as a consequence German nationals, thus citizens of the Reich as opposed to foreigners. But within the Reich discrimination existed, for the citizens of the Protectorate did not possess all the rights of German citizens.³⁹

These questions were settled in the German Decree of April 20, 1939 (Law Gazette 1939 I p. 815)⁴⁰ together with the Circular of the Minister of the Interior of the Reich

38. Document No. 10.

39. Schmied (f.n.36), p. 26; Jellinek, Der automatische Erwerb und Verlust der Staatsangehörigkeit durch völkerrechtliche Vorgänge, p. 167.

40. Document No. 13.

of May 25, 1939⁴¹ and Decree of June 6, 1941⁴² together with the Circular of the Minister of the Interior of October 15, 1941.⁴³

It later seemed opportune for the National Socialist regime to extend the settlement of November 1938. By the Decree of April 20, 1939 all ethnic Germans, who had possessed Czechoslovak citizenship, acquired German citizenship, effective from March 16, 1939, in so far as they had not already acquired it by reason of the treaty arrangements of November 20, 1938. Only the Germans in Slovakia and Ruthenia were excluded. The circular of the Minister of the Interior of the Reich of May 25, 1939 determined that with regard to the Sudeten Germans the change of citizenship did not depend on their affiliation to any people or race.

The decree of June 6, 1941, as supplemented by the above circular, stipulates that persons of German ethnic origin cannot be protectorate subjects. Moreover, regulations were brought out dealing with the German nationality of persons marrying a protectorate subject, of persons already married as at March 16, 1939, and of

41. Ministerial Journal of the Reich, Internal Affairs, p. 1253.

42. Law Gazette 1941 I, p. 308.

43. loc.cit. 1941, p. 1837.

offspring of these marriages. The latter automatically acquired German nationality at birth.

In 1945, when the restoration of Czechoslovakia resulted from the conquest of Ruthenia, Slovakia and finally Bohemia and Moravia by Soviet forces,⁴⁴ the Czechoslovak Government-in-exile, which had been recognized by the Allies at the beginning of the war, became the "Privisional Government of the revived CSR".⁴⁵ In their first session of April 5, 1945 in Kosice, in Eastern Slovakia, they issued the Statute of Kosice which established that the ethnic Germans who possessed Czechoslovak citizenship previously would not recover Czechoslovak citizenship but would be deported. The Government developed the thesis that the Czechoslovak State in its boundaries of January 1, 1938 had continued to exist even after the events of 1939, and that during this period it was unable only to transact business.⁴⁶

44. Schmied, Ibid., p. 30.

45. Ibid.

46. Taborsky writes: "...the recognition of the Czechoslovak Government...raised, of course, the important question of juridical continuity. Is the Czechoslovak State (for the representation of which in the international sphere there was created and officially recognized in July, 1940, a Provisional Czechoslovak Government with the President of the Republic, Dr. E. Benes, as its Head) to be considered as a continuation - from the standpoint of international law - of the Czechoslovak Republic which was territorially truncated as a result of the Munich agreement of September, 1938, and in March, 1939,

incorporated partly in the Greater German Reich and partly (as far as Sub-Carpathian Russia and a part of Eastern Slovakia are concerned) in Hungary? Are both these States from the standpoint of international law one and the same entity and International Person, one and the same subject of international rights and obligations?

There can be no doubt of the fact that the answer must be in the affirmative. ... (through) the illegal use of force by Germany and Hungary the Czechoslovak State did not disappear; its legal existence continued. The Czechoslovak legations in the States which did not recognize the actual state of affairs brought about in March, 1939, continued even after March 14, 1939, in their official diplomatic representation of the Republic.

It is, further, a universally recognized rule of international law that the recognition or non-recognition of a change in the headship of a State, in the composition of its government or in the form of government as well as the recognition or non-recognition of a change in the title of a State or a curtailment of its territory does not in any way effect recognition, and the international legal existence of the State itself and does not make it lose its character as an International Person and as a rightful member of an international society of States. Formal contact with the government of the States (Dominions) which recognized the Provisional Czechoslovak Government was effected - in addition to the direct contact between the Heads of these States and Cabinet Ministers - through the Heads of the appropriate missions abroad, which have in such States (Dominions) been accredited as official representatives of the Czechoslovak Republic, and which have as such continued uninterruptedly to represent the interests of the Czechoslovak State through the whole period of the interregnum from March 15, 1939, when the Government of Hacha came under the power of Germany, to 21st July, 1940, when the new Czechoslovak Government of Dr. Benes was first recognized" (The Czechoslovak Cause, pp. 91-2).

Schwarzenberger writes: "The Sudetenland had never been part of Germany" (Power Politics, p. 457). But there is no further explanation of this standpoint.

The provisions of the law in force before the Munich Agreement were regarded as being effective even after this date.⁴⁷

The theory that the Czech State continued to exist even after the German occupation in the middle of March 1939 contradicts historical facts as well as the principle of effectiveness in international law,⁴⁸ and cannot be supported. But this thesis was enforced only with regard to the ethnic Czechs or Slovaks; it was not applied to the persons who became German citizens by the annexation of Czechoslovakia, although according to Czechoslovak law existing before the Conference of Munich ethnic Germans who were Czechoslovak citizens would regain Czechoslovak citizenship after 1945.⁴⁹

Contrary to the Czechoslovak thesis, the Czechoslovak State perished on March 15, 1939 because it had lost its independence and was incorporated into the German Reich.

A state ceases to be an international person when it ceases to exist.⁵⁰

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47. Schmied (f.n.36), p. 31; Jellinek (f.n.39), p. 166; Wagner, Der Prager Vertrag als Schlusstein der bilateralen Ostpolitik, pp. 66.
48. Brownlie, Principles of Public International Law, p. 415; O'Connell (f.n.37), Vol. I p. 471; Lauterpacht (f.n.31), Vol. I, pp. 155-6.
49. Hilf, Die tschechoslowakische Forderung auf Ungültigkeit des Münchner Abkommens ab initio, loc.cit. p.845.
50. Lauterpacht (f.n.31), Vol. I p. 155.

With regard to this question, Koerber writes:

Das Sudetengebiet ist aufgrund eines völkerrechtlich wirksamen Vertrages (Münchener Abkommen im weiteren Sinn) rechtswirksam von Deutschland und in Erfüllung des Abkommens dem Reich eingegliedert worden.

Die Grenzfestsetzung zwischen Deutschland und der Tschechoslowakischen Republik, die sogenannten Nachmünchener Grenzen, wurde durch die Märzereignisse 1939, den Untergang der Tschechoslowakischen Republik und die Errichtung des Reichsprotektorats Böhmen und Mähren weder zum Vor- noch zum Nachteil des Deutschen Reiches beeinflusst. Deutschland hat keine territoriale Souveränität über das als Protektorat Böhmen und Mähren bezeichnete Gebiet erworben, das heisst eine rechtswirksame Verschiebung der Nachmünchener Reichsgrenzen ist nicht eingetreten, denn es war keine völkerrechtliche Willenseinigung über die Inbesitznahme Böhmens und Mährens zwischen Deutschland und der Tschechoslowakei zustande gekommen (und) das Deutsche Reich hat sich über das Selbstbestimmungsrecht der tschechischen Nation hinweggesetzt und die bedeutendsten Mächte haben unverzüglich gegen die deutsche Massnahme protestiert. ...Die Slowakei ist durch Sezession aus der Tschechoslowakischen Republik ausgeschieden und als souveräner Staat Völkerrechtssubjekt geworden. Die Karpatho-Ukraine (Ruthenia) wurde als Teil des tschechoslowakischen Staates von Ungarn annektiert.⁵¹

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51. Körber, Die Annexion der Resttschechoslowakei, p. 202, 83. E.t.: The Sudeten territory, by reason of an internationally valid treaty (Munich Agreement in the broadest sense) has been assimilated into the Reich by Germany legally and in fulfillment of the Agreement. The delineation of the boundary between Germany and Czechoslovakia, the so-called post-Munich boundary, was by reason of the events of March 1939, the elimination of the Czechoslovak Republic and the establishment of the Protectorate of Bohemia and Moravia, neither to the advantage nor to the disadvantage of Germany. Germany possessed no territorial sovereignty over this area, designated as the Protectorate, which meant that a legal dislocation of the

post-Munich boundary did not ensue, for there was no agreement between Germany and Czechoslovakia over the possession of Bohemia and Moravia (and) the German Reich disregarded the right of self-determination of the Czechoslovak nation and the most important Powers protested immediately against the German measures... By means of secession, Slovakia was separated from Czechoslovakia and became, as a sovereign State, a subject of international law. The Carpatho-Ukraine (Ruthenia) was ...annexed by Hungary.

Thus, the present day Czechoslovak Republic is in error in adhering to the view that the Czechoslovak State never ceased to exist legally but rather endured. The foundation for this view, i.e. that the Munich Agreement was void ab initio and the annexation of the rest of Czechoslovakia on March 15, 1939 was contrary to international law, is not enough, since illegality alone is not sufficient to have allowed the Czechoslovak State to endure as a subject of international law. The unrestricted use of the principle ex iniuria ius non oritur would undoubtedly lead to a still further disparity between the actual state of international affairs and the legal state of affairs.

Although from March 15, 1939 until 1940 neither an independent Czechoslovak State nor any organ which could have represented such a State existed, Marek finds the basis for the legal continuity of Czechoslovakia in the principle ex iniuria ius non oritur⁵².

In spite of the importance of this principle, Marek does not support its unrestricted use but rather establishes a compromise between the principle of effectiveness on the one hand and the ex iniuria principle on the other hand.

52. Marek, Identity and Continuity of States in Public International Law, pp. 311-6; 327-30.

In other words, a certain amount of finality, a consolidation of the new effective situation is required for the normative pressure of facts to prevail against the inherent legality of the system...The effectiveness of the illegal act must be final beyond doubt and every reasonable chance of a restitutio ad integrum must be excluded.⁵³

Both, Fiedler and Ch. Rousseau agree with this view.⁵⁴

However, Marek's thesis has not found unanimous acceptance. Brownlie declares:

Unfortunately the general categories of 'continuity' and 'state succession', and the assumption of a neat distinction between them, only make a difficult subject more confused by masking the variations of circumstance and the complexities of the legal problems which arise in practice. ...what occurred on liberation was restoration, re-establishment of the former state.⁵⁵

Marek's thesis presumes that the disappearance of a State by reason of illegal annexation does not have as a consequence its immediate legal extinction. Rather, Marek argues, a condition is created initially which allows the state to endure legally and actually if the annexation is made retrogressive. If the annexation is not made retrogressive and every reasonable chance of a restitutio ad integrum is excluded, then the condition

53. Ibid., p. 329.

54. Fiedler, Staatskontinuität und Verfassungsrechtssprechung, p. 29; Rousseau, Principes de droit international public, Tome I, pp. 373.

55. Brownlie (f.n.48), pp. 77-8.

which initially set in - which allowed the state to endure - ends. One refers to this temporary condition between the actual disappearance of a state and its restoration as suspension.⁵⁶

As soon as Czechoslovakia was restored, when the territory of the former Czechoslovak State was conquered by the Soviet Union and entrusted to a Provisional Czechoslovak Government, this Government regarded all former citizens of the Protectorate as nationals.⁵⁷ Since the Presidential Decree of August 2, 1945 established that former Czechoslovak citizens who were ethnic Germans

56. A case worthy of attention is that of Austria. According to official Austrian State practice and Austrian domestic law and principles of international law, the Republic of Austria did not disappear through the "Anschluss" with Germany in 1938 but rather continued to exist as a subject of international law. The consequence of this is the uninterrupted identity and continuity of Austria as the same State during the time of its inclusion in the German Reich (see Adamovich-Spanner, Handbuch des österreichischen Verfassungsrechts, 5. Aufl., p. 39).

These writers talk of the restoration of Austria's ability of act by reason of the "Declaration on Austria" which the Great Powers published at the Moscow Conference of Foreign Ministers on November 1, 1943. See also Seidl-Hohenfeldern, Völkerrecht, pp. 192, 241 and the literature cited by the authors.

57. See further Jellinek (f.n.39), p. 170.

and had acquired German citizenship by the laws of a foreign occupying power would lose Czechoslovak citizenship,⁵⁸ this provision contradicts the thesis of voidance of all statutes of the occupying powers, for, if the German statutes during the period when Czechoslovakia was subjugated had no legality, then also the concession of German citizenship to Czechoslovak citizens was void.

In spite of this, the acquisition of German citizenship was used to support the deportation of these Germans as "undesirable aliens". The reason was not the acquisition of a foreign citizenship but merely German nationality. Evidence thereof is produced by the provision in Article 1, paragraph 2 of the Decree of August 2, 1945 that Czechoslovak citizens who were ethnic Germans but had not acquired German citizenship would also lose Czechoslovak citizenship (e.g. ethnic Germans in Slovakia).

In reality the Government of Czechoslovakia decided to solve by force and in a barbarous manner the problem of minorities in Czechoslovakia by expelling the German living there. Since it was certainly not expedient to allow these expellees to retain Czechoslovak citizenship, they were stripped of it. This decision, however, was merely a consequence of the primary goal to deport the Germans.

58. Document No. 18.

In Article 3 of the Decree of August 2, 1945 Germans who lost Czechoslovak citizenship were conceded the right to petition for its restoration within six months. This provision remained without any practical significance. More than three million Germans were exiled and had no possibility of making use of this provision. Only a comparatively small number of Germans remained, including specialists who were indispensable to the State or close relatives of native citizens.⁵⁹ But these people also made no use of the possibility of option.

Thereupon on November 29, 1949 a provision was issued⁶⁰ by the Government which made it possible for the ethnic Germans who had remained in Czechoslovakia to petition for their lost Czechoslovak citizenship. Since this offer was not accepted either, in spite of the time extension, Czechoslovak citizenship was conferred on all ethnic Germans regardless of their own personal desires by reason of the Statute of April 24, 1953. In this context, Schmied⁶¹ speaks of compulsory naturalization.

59. The FAZ of June 22, 1973 mentions a number of 125,000.

60. Document No. 19.

61. Document No. 20; Schmied (f.n.36), p. 43.

The attitude of the CSSR regarding the compulsory naturalization of the Germans remained in its territory presents a contradiction of ruling principles of public international law in this field, because the nationality is a relationship between the individual and the State characterized by public rights and obligations, and can be described as membership in the State.

Starke writes:

Nationality is the most frequent and sometimes the only link between an individual and a State, ensuring that effect be given to that individual's rights and obligations at international law. It may be defined as the status of membership of the collectivity of individuals whose acts, decisions, and policy are vouchsafed through the legal concept of the State representing those individuals.⁶²

It results from this that one cannot compulsorily burden a person with this legal relationship.

Strupp-Schlochauer state:

Darüber, dass die Ermessensfreiheit jedes Einzelstaates bei der Vergebung seiner Staatsangehörigkeit nicht grenzenlos ist, ...bestehen... keine Zweifel..., als geboten betrachtet werden... das Verbot der Aufzwingung der Staatsangehörigkeit ...⁶³

Also for Makarov the imposed acquirement of nationality is out of question:

62. Starke, Introduction to International Law, p. 290.

63. Strupp-Schlochauer (f.n.28), Bd. 3, p. 325.
E.t.: There are...no doubts about the fact that the liberty of discretion of each individual state is not unlimited,...the prohibition of the imposition of the citizenship can be considered imperative... .

...ein Erwerb bei dem der Betroffene keine Willenserklärung abgegeben hat, weder direkt noch indirekt.⁶⁴

Hudson writes:

Naturalization must be based on an explicit voluntary act of the individual or a person acting on its behalf.⁶⁵

Greig points out:

Naturalization is the method adopted for admitting foreign nationals voluntarily to citizenship.⁶⁶

Brownlie explains:

The analogue of deprivation of nationality is provided by the cases described as compulsory change of nationality and "collective naturalization". ...tribunals have occasionally stated...that international law does not permit compulsory change of nationality. The United States, the United Kingdom, France and other states have often protested against "forced naturalization provisions...".⁶⁷

The draft of the Harvard Law School (Article 15) reads (in extracts) as follows:

...a state may not naturalize a person... without the consent of such person.⁶⁸

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64. Makarov, Deutsches Staatsangehörigkeitsrecht, p. 386. E.t.: ...an acquirement where the person concerned has not given a declaration of intent, neither directly nor indirectly.
 65. UN Doc. A/CN.4/50, Nationality, including Statelessness, Report of Manley O. Hudson, Special Rapporteur, February 21, 1952, YB. I.L.C. 1952, Vol. II, p. 8.
 66. Greig, International Law, p. 377.
 67. Brownlie (f.n.48), p. 331-2.
 68. Draft Conventions and comments on nationality, responsibility of states for injuries to aliens, and territorial waters, prepared by the research in international law of the Harvard Law School, Suppl. to the A.J.I.L., Vol. 23, Special Number, April, 1929, p. 53.

The comment points out, that

...this article expresses a general rule that a state cannot properly naturalize aliens without their consent. ...the general principle that a state is free to acquire the allegiance of natural persons without their consent is believed to be generally recognized. ...The "consent" mentioned in this article means express consent or an act which in itself shows unquestionable the desire and intention of a person to take the nationality of a state.⁶⁹

A convincing source of law concerning this question is Law No. 12 of the Allied High Commission for Germany, November 17, 1949 ("Nullity of certain provisions of national-socialist legislation on nationality"), which states that the compulsory conferment of the German nationality to French and Luxemburgian citizens by the legislation of the Reich was legally ineffective from the very beginning:

Whereas for purposes of annexation the National-Socialist Government enacted legislation imposing German nationality on persons or groups of persons in breach of the principles of the Law of Nations and certain of these provisions affect nationals of France and of Luxembourg, the Council of the Allied High Commission enacts as follows: To the extent that the Reich Ordinance of 23 August 1942 (RGBl. I, p. 533) and the Führer's Decree of 19 May 1943 (RGBl. I, p. 315) purport to confer German nationality compulsorily on nationals of France and of Luxembourg such Ordinance and Decree are hereby declared to have been null and void.⁷⁰

69. Ibid., pp. 53-5.

70. Official Gazette of the Allied High Commission for Germany 1949, November 21, 1949, No. 4, pp. 29-30 (30).

In an interpretation of this Law by the Allied High Commission it was stated that any conferment of the German nationality as a result of the decree of August 23, 1942 was to be regarded as compulsory transfer. The interpretation was binding on the German authorities.⁷¹

Czechoslovakia's behaviour with regard to the compulsory naturalization of the remaining Germans contradicts especially Article 15, paragraph 2 of the Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 A (III) of December 10, 1948, which states:

No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.⁷²

But according to most legal authorities in international law, the Universal Declaration of Human Rights has no binding force.

O'Connell writes:

As a legal document the Universal Declaration is of doubtful significance. Even its architects appear to have regarded it as no more than a Statement of principles in the political realm, or at best enjoying no more legal authority

71. Massfeller, Das deutsche Staatsangehörigkeitsrecht, p. 413.

72. UN Doc. ST/HR/1, Human Rights, a compilation of international instruments of the United Nations pp. 1-3 (2); Berber, Völkerrecht, Dokumentensammlung, Bd. I pp. 917-23 (920).

than any other recommendation of the General Assembly. As an elaboration of Articles 55 and 56 of the United Nations Charter, it does, however, have some juridical character, even if the machinery for rendering it effective is unpromising, though not non-existent.⁷³

It must be added further that Czechoslovakia had not consented to the Declaration of Human Rights but had abstained from voting.⁷⁴

In spite of this widespread legal point of view one can however hardly say that the prohibition of compulsory naturalization has so far gained acceptance as generally binding principle of public international law, with the consequence that the Sudeten Germans remained in the CSSR and now of Czechoslovak nationality, would have a legitimate right to escape the compulsorily conferred citizenship.

The compulsory naturalization of the Germans still living today in Czechoslovakia, therefore, is valid according to Czechoslovak law. On the other hand German law does not recognize the loss of citizenship by compulsory naturalization. Persons naturalized in a compulsory manner

73. O'Connell (f.n.37), Vol. II, pp. 821-2). See further Lauterpacht (f.n.31), Vol. I, p. 745; Berber, Lehrbuch des Völkerrechts, Bd. I p. 32, 373; Dahm (f.n.28) Bd. I pp. 427.

74. See Schmied (f.n.36), p. 44, f.n.1

by another State retain German citizenship according to German law and are referred to as 'sujets mixtes',⁷⁵ (double nationals).⁷⁶

It was impossible for either Government to regard the other's actions as legal. On this point there was only one way to reach an accord, and that was to disregard the past and provide for the future.⁷⁷ To this end Article II, paragraph 2 of the Treaty states:

The present Treaty shall not affect the nationality of living or deceased persons ensuing from the legal system of either of the two Contracting Parties.

Questions of nationality in German law were arranged by Article 116, paragraph 1 of the Constitutional Law of the Federal Republic, the Federal Law of May 19, 1953 (Law concerning the affairs of expellees and refugees) and the Federal Statute of February 22, 1955. In principle all

75. Schmied, Ibid., p. 44.

76. The Judgement of April 6, 1955 in the Nottebohm Case stated on page 21: "When one State has conferred its nationality upon an individual and another State has conferred its own nationality on the same person, it may occur that each of these States, considering itself to have acted in the exercise of its domestic jurisdiction, adheres to its own view and bases itself thereon in so far as its own actions are concerned. In so doing, each State remains within the limits of its domestic jurisdiction" (D.D.I.C.J. 1947-1958, p. 100).

77. See speech given by Foreign Minister Scheel at the 90th session of the Federal Diet, March 27, 1974 (BT-Drucksache 7/1832, Tz. 6037, A, B).

ethnic Germans expelled from Czechoslovakia became citizens of the Federal Republic of Germany. To avoid recapitulation, reference is made to documents No. 4 (with annotation) and No. 5.

The Treaty of December 11, 1973 provides that citizenship remains unchanged. This implies that the Germans deported from Czechoslovakia after the war lost Czechoslovak citizenship, but retained German citizenship. The Germans who were not deported and who in accordance with German law acquired German citizenship as a consequence of the annexation of Czechoslovakia possess German citizenship in accordance with German law and Czechoslovak citizenship in accordance with Czechoslovak law. Those Germans who did not acquire German citizenship after the dissolution of Czechoslovakia in 1939, e.g. those who lived in autonomous Slovakia, possess Czechoslovak citizenship only.

b) Material Claims

If the Munich Agreement was void from the beginning, the occupation of Czechoslovakia and all other actions of German authorities within the territory of the former Czechoslovak State were without legal effect and therefore unlawful. The annexation of the remaining provinces of Czechoslovakia in 1939 was an illegal act.

An essential consequence of such a violation of inter-

national law is the subsequent obligation to pay damages.⁷⁸

The same principle is applicable to violations of international law committed by the Czechoslovak State after the war: expulsion of the Sudeten Germans and the complete expropriation of their goods and chattels. These measures were without any legal basis and were inconsistent with the agreements protecting minorities which the Czechoslovak Republic had concluded on September 10, 1919 with Great Britain, the United States of America, Italy and Japan (the Treaty of minorities).⁷⁹

O'Connell points out:

International wrongs may be divided into two principal categories for the purpose of analysis of reparation - moral and material. The former are those which affect the dignity of the State and thereby impair the harmony of international relations. The latter are those which occasion loss of property or suffering and inconvenience to individuals. Frequently the two are associated, and this explains why two forms of reparation may be ordered for a single event. In addition, remedies may be regarded as strictly compensatory or as penal, or as partly compensatory and partly penal.

78. Lauterpacht (f.n.31), Vol. I p. 352; Delbez, Les Principes Généraux du Droit International Public, p. 384; O'Connell (f.n.37), Vol. II pp. 1203-13.

79. See Part I, f.n.6 of this thesis; Hilf, Die tschechoslowakische Forderung auf Ungültigkeit des Münchner Abkommens ab initio, loc.cit. p. 855.

...Reparation may take the following forms:
 ...restitutio in integrum..., compensation...,
 penal damages..., annulment... .. apology...,
 abstract declarations of rights and wrongs...,
 affirmation of rights.⁸⁰

Lauterpacht writes:

An international delinquency is any injury to another State... committed by a State in violation of an international legal duty...

The principal legal consequences of an international delinquency are reparation of the moral and material wrong done. The merits and the conditions of the special cases are...different. ...The only rule which is unanimously recognised ...is that out of an international delinquency arises the right for the wronged State to request from the delinquent State the performance of such acts are necessary for reparation of the wrong done.⁸¹

Schwarzenberger explains:

In international law, the duty to make reparation means the obligation to re-establish, as far as possible, the state of affairs as it would probably have existed had the international tort not been committed. The particular function of this rule is to assist in the restoration of the legal equilibrium which has been disturbed by the commission of an international tort.

Thus, in the first place, reparation takes the form of restitution in kind. If this is not possible, two subsidiary forms of reparation are available: satisfaction and compensation. Satisfaction is any non-monetary form of reparation which falls short of restitution in kind. A formal apology or condemnation of an act by an international tribunal illustrates this type of reparation. For the rest, there is only monetary compensation as a substitute for the impossible restoration of the status quo ante.⁸²

80. O'Connell (f.n.37), Vol. II, pp. 1203-8.

81. Lauterpacht (f.n.31), Vol. I, pp. 338; 352-3.

82. Schwarzenberger, A Manual of International Law, Vol. 1, p. 169.

The Czechoslovak insistence on defining the Munich Agreement as void ab initio was seen by a number of German groups as an effort to provide a legal basis for material claims for reparation. Such reparation demands were rejected by the Federal Republic, however, on the grounds that the regulation of any demand for reparations had to be reserved to a general treaty of peace among the parties of World War II. The German Government made this standpoint clear during the London Conference of February 28 - August 8, 1952, with the result that Article 5, paragraph 2 of the Agreement on German External Debts, concluded in London on February 27, 1953, decided that

all claims arising out of the Second World War by countries which were at war against or were occupied by Germany during that war, and by nationals of such countries against the Reich and agencies of the Reich, including costs of German occupation...shall be deferred until the final settlement of the problem of reparation.⁸³

Of course, this Agreement is not applicable to Czechoslovakia since the Czechoslovak Government did not accede to it. Nevertheless, during the negotiations with Czechoslovakia the standpoint of the Federal Republic remained the same: Germany refused to discuss any problem of such material claims.⁸⁴ This position was taken by the

83. Gurski, Das Abkommen über deutsche Auslandsschulden, p. 173 in Kiehnsherf, Die Regelung der deutschen Auslandsschulden im Rahmen internationaler Verträge, p. 51; Text of the Agreement: Law Gazette II, 1953, pp. 331-3.

84. BT-Drucksache 7/1434, January 24, 1974, Tz. 4824 D.

then Federal Minister for Foreign Affairs, Herr Scheel, on March 27, 1974 in response to a question during a debate in the Federal Diet.⁸⁵ It is also explicitly expressed in Article II, paragraph 3 of the Treaty, in which it is stated that

the ... Treaty together with its declarations on the Munich Agreement, shall not constitute any legal basis for material claims by the Czechoslovak Socialist Republic or its natural and legal persons.

German material claims are also not mentioned.

Throughout the Treaty no circumstances are mentioned which could be used to substantiate German demands. Thus, it can be argued that the Treaty makes no provision for claims for damages. This was also the official point of view of the Federal Republic expressed in reply to the opinion of the Federal Council:

Bestehende Rechte gehen durch den Vertrag niemanden verloren. Ausserdem ist klargestellt, dass aus dem Vertrag von tschechoslowakischer Seite keine materiellen Ansprüche abgeleitet werden können.⁸⁶

At this stage, Seidl-Hohenveldern amalgamates the mutual compensation claims of the parties to the treaty with those of their respective nationals against the other

85. BT-Drucksache 7/1832, Tz. 6038 A-C.

86. BT-Drucksache 7/1832, G.d.B. p. 20; E.t.: Nobody loses existing rights by the treaty, It is also made clear that no material claims can be deduced from the treaty which would benefit the Czechoslovak side.

signatory State, in this case of German nationals against Czechoslovakia for loss or property following their expulsion. He states:

Wenn die CSSR unter Berufung auf die Tatsache, dass auch nach dem Wortlaut des Prager Vertrages die Erhebung von Reparationsansprüchen aus anderen Gründen als aus denen der Nichtigkeit des Münchener Abkommens zulässig sei, solche Reparationsansprüche stellen sollte, stellt sich zwangsläufig die Gegenrechnung mit den Sach- und Personenschäden, die Personen deutscher Volkszugehörigkeit wegen dieser ihrer Volkszugehörigkeit in der Tschechoslowakei zugefügt worden sind. Sowohl dieser deutsche Entschädigungsanspruch als auch der tschechoslowakische Entschädigungsanspruch bewegen sich in astronomischen Höhen, die aber in der Richtung leicht herauf- oder herabgesetzt werden können. Jeder Versuch einer Konkretisierung wirft so zahlreiche Begründungs- und Berechnungsprobleme auf, dass es naheliegend und gewiss auch vertretbar ist, dem Beispiel des seinerzeitigen sowjetischen Vorschlags eines Friedensvertrages mit Deutschland zu folgen und auf gegenseitige Entschädigungsansprüche zu verzichten. Eine solche gegenseitige pauschale Aufrechnung würde dann allerdings zur Folge haben, dass den betroffenen Deutschen daraus ein Aufopferungsanspruch gegen die Bundesrepublik Deutschland erwachsen würde.⁸⁷

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87. Das Münchener Abkommen im Lichte des Prager Vertrages loc.cit. p. 467-8. E.t.: Should Czechoslovakia make reparation claims by relying on the fact that, according to the text of the Prague Treaty, reparation claims may be based on other grounds than on the nullity of the Munich Agreement, then it is inevitable that a counterclaim should be made for damage to property and personal injuries suffered in Czechoslovakia by German nationals because of their nationality. Both the German and the Czechoslovak indemnity claims are of enormous proportions, but can be adjusted either upwards or downwards.

Any attempt at a definition raises many questions of substantiation and calculation which make it reasonable and advisable to follow the suggestion of a peace treaty with Germany made at that time by the Soviet Union and to renounce to mutual^a compensation claims. Such a general settlement, however, would also cause a claim based on self-sacrifice to arise against the Federal Republic of Germany on behalf of all those Germans affected by it.

c) Humanitarian Questions and Questions of
Legal Prosecution

By the maintenance of the citizenship regulations in the legal codes of both countries many German people who remained within the territory of Czechoslovakia retained Czechoslovak citizenship. A substantial number of them, however, wanted to leave the CSSR and immigrate into the Federal Republic of Germany. It is of great concern to the Federal Republic that the desire of these Germans is granted. The main problem is that these persons became citizens of the CSSR in consequence of Czechoslovak legislation, and it can be argued that emigration is a matter of domestic jurisdiction.

Lauterpacht writes on this question:

Emigration is in fact entirely a matter of internal legislation of the different States... . The Law of Nations does not, as yet, grant a right of emigration to every individual, although it is frequently maintained that it is a 'natural' right of every individual to emigrate from his own state. It is a moral right which could fittingly find a place in any international recognition of the Rights of Man.⁸⁸

Although the Universal Declaration of Human Rights of December 12, 1948 recognizes the right of emigration in Article 13, paragraph 2, it has, as we know, no binding authority per se.⁸⁹

88. Lauterpacht (f.n.31), Vol. I, pp. 647-8.

89. Ibid., p. 745. It is uncontested that a Declaration is not binding per se, but such a Declaration may reflect emergent customary international law (see Part I, f.n. 234, para 7-11 at p. 204).

No binding authority has also the UN Covenant on Civil and Political Rights, adopted by the General Assembly on December 16, 1966, ratified by Czechoslovakia, but not yet in force,⁹⁰ whose Article 12 runs as follows:

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90. "It will be recalled that the two draft International Covenants on Human Rights - on Civil and Political Rights and on Economic, Social and Cultural Rights - prepared by the Commission on Human Rights, had been under consideration by the General Assembly since 1954. By the end of 1963, the Assembly's Third (Social, Humanitarian and Cultural) Committee had adopted the preamble and all of the general articles of both Covenants. It had also adopted additional provisions. ...Provisions relating to measures of implementation and final clauses were still to be adopted.

Work on the draft Covenants could not be continued in 1964 at the Assembly's nineteenth session, owing to the special circumstances then prevailing. At the Assembly's twentieth session, in 1965, the Third Committee was unable to consider the draft Covenants because of its heavy agenda, and the assembly decided to defer their further consideration until its twenty-first session in 1966.

At the Session, the Third Committee completed the drafting of the two Covenants by adopting articles relating to measures of implementation and final clauses of the draft Covenant on Economic, Social and Cultural Rights, and the draft Covenant on Civil and Political Rights, as well as by adopting provisions for an Optional Protocol to the Covenant on Civil and Political Rights. It also adopted draft resolutions on publicizing the Covenants and on the establishment of national commissions on human rights.

After considering the various proposals and amendments before it, the Third Committee adopted the two Covenants unanimously, that on Civil and Political Rights having been adopted by roll call. The Optional Protocol to the draft Covenant on Civil and Political Rights was adopted in the Committee by a roll-call vote of 59 to 2, with 32 abstentions. ...

The General Assembly unanimously adopted the Third Committee's recommendation as a whole by a recorded vote of 104 to 0, when it adopted resolution 2200 A (XXI) on December 16, 1966. In separate votes, the Assembly adopted: the Covenant of Economic, Social and Cultural

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.⁹¹

Thus, according to international law, Czechoslovakia has no obligation to permit her nationals to emigrate to the Federal Republic of Germany.

Of course the possibility did exist to impose an obligation on Czechoslovakia in the Treaty. Indeed, such obligations were set down in many treaties after World War I,⁹² but Czechoslovakia obviously was not prepared to undertake such an unconditional obligation. These Germans

Rights by a recorded vote of 105 to 0; the Covenant on Civil and Political Rights by a recorded vote of 106 to 0; and the Optional Protocol to the Covenant on Civil and Political Rights by a recorded vote of 66 to 2, with 38 abstentions" (UN YB. 1966, p. 406).

91. UN Res. 2200 A (XXI), 16 December 1966 with Annex, UN YB. 1966, pp. 419-33 (425). The Covenant on Civil and Political Rights called for freedom of movement. ... (loc.cit. p. 407).

92. Ibid., p. 648, note 2.

who became Czechoslovaks simply by Statute were badly needed as specialists in manufacturing or craft industries and to have lost these persons would have placed enormous strains on the Czechoslovak economy.⁹³ A general obligation of the Prague Government to allow all remaining Germans to emigrate could not be obtained. For that reason the question of emigration was not dealt with in the Treaty but in an Exchange of Letters. The technical difference between integration of a provision in the text of a treaty or in the text of an exchange of letters is not important in international law:

The Law of Nations does not prescribe any particular form in which international negotiations must be conducted. Such negotiations may, therefore, take place viva voce, or through the exchange of written representations and arguments, or both.⁹⁴

Article 2, paragraph 1 (a) of the Convention on the Law of Treaties prescribes:

..."treaty" means an international agreement concluded between States in written form..."

This is not at all to suggest, however, that oral agreements are without binding force. In the draft articles on the Law of Treaties with Commentaries adopted by the International Law Commission at its 18th session it is stated:

93. SZ of August 10, 1973.

94. Lauterpacht (f.n.31), Vol. I, p. 868.

The restriction on the use of the term "treaty" in the draft articles to international agreements expressed in writing is not intended to deny the legal force of oral agreements under international law or to imply that some of the principles contained in later parts of the Commission's draft articles on the law of treaties may not have relevance in regard to oral agreements. But the term "treaty" is commonly used as denoting an agreement in written form.⁹⁵

Thus, the Convention did not change anything on the existing freedom of form for agreements under international law; it determined merely that orally concluded agreements cannot be considered treaties.

An exchange of letters, however, meets the condition of form for a treaty expressly provided for in Article 13 of the Convention on the Law of Treaties.⁹⁶ Indeed, an exchange of letters reflects well established law and practice.

Moreover, the contracting parties included the wording of the agreement in the exchange of letters which was subsequently ratified and published.⁹⁷ Thus, all formal

95. UN Doc. A/CONF. 39/11/Add. 2, p. 9.

96. Ibid., p. 291.

97. Law Gazette II, 1974 pp. 989, 993, 996.

The Parties agreed:

1. Within the framework of their efforts to develop mutual relations, the Government of the Federal Republic of Germany and the Government of the Czechoslovak Socialist Republic will give attention to the humanitarian questions.

preconditions of validity of the agreement in the exchange of letters binding under international law are met.⁹⁸

In section 1 of the exchanged letters both parties bind themselves to give attention to humanitarian questions. Considering the fact that both peoples in the past committed

2. The Czechoslovak side has declared that the competent Czechoslovak authorities will, in accordance with the laws and regulations applicable in the Czechoslovak Socialist Republic, give sympathetic consideration to applications by Czechoslovak citizens who, on account of their German nationality, wish to emigrate to the Federal Republic of Germany.

The German side has declared that, in accordance with the laws and regulations applicable in the Federal Republic of Germany, persons of Czech or Slovak nationality who so desire may emigrate to the Czechoslovak Socialist Republic.

3. Neither Government objects to the German Red Cross and the Czechoslovak Red Cross furthering the settlement of the above-mentioned questions.

4. The two Governments will further develop travel between the two countries, including visits by relatives.

5. The two Governments will examine possibilities of technical improvements of travel, including expedited clearance at the border-crossing points as well as the opening of additional crossing-points.

6. The contents of this exchange of letters will also be applied analogously to Berlin (West), consistent with the Quadripartite Agreement of 3 September 1971, in accordance with established procedures (Press and Information Office of the FG, pp. 12-3).

98. Brown, D.J. (Public International Law,) p. 177) writes: "Whenever States treat with one another, and in so far as they reach any agreement, their dealings constitute some kind of treaty. When the terms of the arrangement contain one or more promises, intended to be binding, the treaty is a contract which the promisor must perform. As there need be no consideration moving to the promisor, a unilateral promise made by one State to another, which is intended to be binding, is a contract."

the gravest of crimes against humanity, the mutual promise to give attention to humanitarian questions cannot be underrated.

With regard to the emigration of ethnic German citizens of Czechoslovakia, the Prague Government in section 2 declares that the competent Czechoslovak authorities will, in accordance with the laws and regulations applicable in the CSSR, give sympathetic consideration to applications by Czechoslovak citizens who wish to emigrate to Germany because of their German nationality.

During the presentation of the bill to the Plenum of the Federal Diet⁹⁹ the opposition maintained with regard to these promises that, from the Czechoslovak side, each obligation was so vague that it could not be fulfilled. Although this is not a legitimate criticism, German emigration in the future will depend at least on the good will and also on the good faith of Czechoslovak authorities.

The facilitation of travel between both countries, agreed to under sections 4 and 5 of the exchange of letters, will be easier to realize since both States have a vested economic interest in its development.

In addition to the Exchange of Letters on Humanitarian Questions, especially those concerning emigration, the Czechoslovak Government also issued an Unilateral Letter

99. BT-Drucksache 7/2270, p. 24.

on Criminal Prosecution, published with the Treaty.¹⁰⁰ In this declaration the Federal Government is informed that of all punishable acts committed between 1938 and 1945, according to Czechoslovak law only those acts may be prosecuted which carry the death penalty and which are considered war crimes or crimes against humanity within the meaning of Article 6 (b) and (c) of the Statute of the International Military Tribunal of Nuremberg. All other crimes are subject to statutory limitation. In the report and the bill to the Committee of Foreign Affairs of the Federal Diet this letter is characterized as an unilateral document binding the CSSR.¹⁰¹

100. Law Gazette II, pp. 989, 997; Wittmann, Auslegungsprobleme um den deutsch-tschechoslowakischen Vertrag, loc.cit. pp. 37-8.

101. BT-Drucksache 7/2270, p. 13. E.t. of the letter: "On the occasion of the signing today of the Treaty on Mutual Relations between the Federal Republic of Germany and the Czechoslovak Socialist Republic, I have the honour to inform you of the following on behalf of the Government of the Czechoslovak Socialist Republic:

Of the punishable offences committed between 1938 and 1945, now only such acts may still be prosecuted under applicable Czechoslovak law as are punishable under Czechoslovak criminal law, carry the death penalty and at the same time answer the characteristics of war crimes or crimes against humanity within the meaning of Article 6 (b) and (c) of the Statute of the International Military Tribunal of Nuremberg. Offences of that kind are not subject to statutory limitation.

In all other cases criminal prosecution became subject to statutory limitation not later than 1965. This situation is not in any way changed by the present Treaty" (Press and Information Office of the GFRG, p. 15).

The legal question to be answered is whether such a unilateral declaration binds the State which makes it. The one-sided legal transaction is a familiar device in international law. Examples of such legal transactions are the recognition of States and Governments, protests against a violation of international law or, as is the case here, the unilateral obligation promised by one State vis-a-vis another State. Unilateral legal transactions include also declarations of legal intent. As such they need to be received, but not necessarily accepted.

The Vienna Convention on the Law of Treaties does not mention the unilateral legal transaction in international law since it considers itself an organ of treaty law only; nevertheless it does not exclude the legal existence of unilateral obligatory declarations of intent by competent subjects of international law. And for our purposes, a whole series of prescriptions of the Convention can be referred to, namely the interpretation and determination of the formal and diplomatic methods of conduct of competent organs of State during the deliverance or acceptance of a unilateral obligatory legal act.

One of the leading authorities on the unilateral legal transaction in international law, Suy explains:

Notre thèse est la suivante: les promesses purement unilatérales ('actes...qui ne nécessitent pas l'intervention d'une autre manifestation de volonté pour produire des effets juridiques', end.c. pp. 113-4) existent en droit international bien qu'elles soient très rares. Cette rareté s'explique facilement étant donné qu'aucun Etat ne se prête de son gré à faire des concessions spontanées et gratuites. La détection de ces promesses purement unilatérales exige un effort de recherche minutieux...

...Une fois la pureté de l'unilatéralité établie, il faudra porter, notre attention sur une question d'interprétation très délicate: cette déclaration de volonté constitue-t-elle une promesse, ou n'est-elle pas plutôt une renonciation ou une reconnaissance ou encore une simple confirmation.¹⁰²

102. Suy, Les Actes Juridiques unilatéraux en droit international public, p. 111.

E.t.: Our main principle is the following: There is in public international law that purely unilateral promise, an act which does not necessitate the evocation of another declaration of intent in order to call forth legal consequences, although these kinds of acts occur infrequently. This infrequency is easily explained by the fact that no State is prepared of its own free will to make concessions spontaneously and without cost. The determination of a purely unilateral promise demands therefore a careful and painstaking investigation... If the genuineness of the unilateral promise is determined, then we have to direct our attention to a very fine question of interpretation, namely whether this declaration of intent represents a promise or whether it is not really a question of a renunciation or a recognition or even a simple confirmation.

Suy comes to the conclusion that the validity of a unilateral act is to be considered obligatory, if the State delivering the declaration meets the following:

...à côté des conditions généralement requises pour la validité des actes juridiques (capacité juridique du sujet, volonté non viciée, objet approprié)...(les) conditions...comme suit: 1^o, la volonté de promettre; 2^o, la publicité de la promesse.¹⁰³

Suy cites the following remark made by Professor de Visscher in a public session of the International Court of Justice on September 15, 1960:

Les Etats doivent savoir que la vie internationale requiert la sécurité et que pour cette raison il ne leur est pas permis de revenir sur leurs propres déclarations lorsque celles-ci ont déterminé un autre Etat à leur accorder confiance et crédit.¹⁰⁴

Balladore Pallieri explains:

Come è in facoltà dei soggetti internazionali di estinguere con una loro dichiarazione unilaterale di volontà un loro diritto (rinuncia), così è in loro facoltà di far sorgere nel medesimo modo a loro carico un dovere giuridico (promessa).

103. Ibid., p. 149. E.t.: Apart from the general conditions which are necessary for the validity of a legal act (the legal capacity of the subject, freedom of will, suitable object)...the...following conditions (are required): 1. the will to make a promise; 2. the publication of the promise.

104. Ibid., p. 152. E.t.: States have to realize that international life demands security and for this reason it is not permissible for them to go back on their own declarations, if these occasioned another State to grant them trust and credence.

La promessa da parte di un soggetto di seguire una data linea di condotta, è impegnativa, e fa sorgere l'obbligo che il soggetto dichiara di assumere. Occorre tuttavia da parte del soggetto che promette, la volontà di impegnarsi, e sono qui da ripetere le medesime osservazioni svolte a proposito dei trattati internazionali, ove avevamo avvertito quanto rigoroso sia l'ordine internazionale a questo riguardo, e come la volontà di impegnarsi debba sussistere ben chiara e ben precisa affinché l'obbligo abbia origine.¹⁰⁵

On the one hand, the unilateral declaratory act has to be distinguished from a purely political declaration¹⁰⁶ of intent without binding legal effect, and on the other hand from a declaratory act which requires a corresponding declaration to secure a legal effect (for example, treaty offer and treaty acceptance, or treaty offer and treaty rejection). By themselves these declarations have no

105. Balladore Pallieri, Diritto Internazionale Pubblico, pp. 325-6. E.t.: In the same way that international bodies have the power to extinguish their rights by way of unilateral declaratory act (renunciation), in the same way have they the power to create by the same process a legal obligation (promise). A party's promise to act in a certain way has a binding effect, thus creating the obligation which the party has declared to undertake. However, it is necessary for the promise to have the will to be bound. At this point we would like to repeat the same comment made with reference to international treaties. In this comment we had warned of how strict international law in this regard is, and how the will to be bound should be quite clear and precise in order to provide the obligation with an origin.

106. Sørensen, Principes de Droit International Public, p. 58.

significance and are, therefore, not independent, unilateral legal transactions, but rather parts of a bi-lateral or multi-lateral legal transaction, i.e., a treaty.

In order to distinguish a genuine unilateral obligatory declaration from a declaration which is part of a treaty, it is necessary to observe whether, according to objective law, a single declaratory act is sufficient to occasion the desired legal effect.¹⁰⁷

"Ein einseitiges Völkerrechtsgeschäft liegt ...vor, wenn nach objectivem Recht eine einzige Willenserklärung genügt, um die gewünschten Rechtswirkungen eintreten zu lassen. Grundsätzlich ist daher nicht massgebend, ob im einzelnen Fall mehrere Willenserklärungen abgegeben werden, sondern der Umstand, dass eine einzige Willenserklärung zur Erzeugung der Rechtswirkungen ausreicht. Wenn nun zufällig mehrere Willenserklärungen, die sich inhaltlich decken und aufeinander bezogen sind, vorgenommen werden, eine einzige aber von ihnen genügen würde, um die gewünschten Rechtsfolgen nach sich zu ziehen, so wären die anderen Willensakte überflüssig und in Bezug auf diese Rechtsfolge irrelevant, so dass das Geschäft einseitig bliebe."¹⁰⁸

107. Pfluger, Die einseitigen Rechtsgeschäfte im Völkerrecht, pp. 34; Balladore Pallieri (f.n. 105), p. 325.

108. Pfluger, Ibid., p. 34. E.t.: A unilateral legal act of international law exists when, according to objective law, a single declaratory act is necessary in order to bring about the desired legal effects. The crucial factor, therefore, is basically not the fact that in a particular case a number of declaratory acts have taken place, but that a single declaratory act suffices to give rise to the legal effects. Should several declaratory acts be accidentally performed, whose contents correspond and which refer to one another, and just one of them would be sufficient to produce the desired legal effects, then the other declaratory acts would be superfluous and, with regard to these legal effects, irrelevant, so that the legal act would remain unilateral.

Pfluger further explains:

Der Ausdruck oder die Form, in die eine Willenserklärung gekleidet ist, kann nicht darüber entscheiden, ob ein konkreter Tatbestand ein einseitiges oder ein zweiseitiges Rechtsgeschäft ist.¹⁰⁹

If, according to these characteristics, a unilateral declaration exists, then it is binding if the circumstances reveal that more than a diplomatic assurance was intended.¹¹⁰

With respect to all three documents (exchange of letters and one-sided declaration), we arrive at the following result:

Since the letters on the extension of Articles II and V to Berlin (West) and on Humanitarian Questions were transmitted by the German side to Czechoslovakia and returned by Czechoslovakia with the same wording and were ratified together with the treaty, this exchange of letters is obviously considered part of the treaty and has, therefore, the same force as if the exchange had been a part of the treaty itself.

109. Pfluger, Ibid., p. 35.

E.t.: The expression or form in which a declaratory act is couched, cannot determine whether concrete factual findings represent a unilateral or a bilateral legal transaction.

110. Garner, The international binding force of unilateral oral declarations, A.J.I.L., Vol. 27 (1933), p. 495.

This standpoint is taken also by Kimminich. In Article V of the treaty itself he thinks he can recognise the legal basis for the treaty-type character of the statements contained in the exchange of letters when he writes:

Art. V des Prager Vertrages enthält wichtige Absichtserklärungen zur weiteren Entwicklung der deutsch-tschechoslowakischen Beziehungen. Eine materiellrechtliche Regelung ist in ihm nicht enthalten. Jedoch sind im Zusammenhang mit Art. V des Prager Vertrages zwei Briefwechsel zwischen der Bundesrepublik Deutschland und der CSSR zu beachten, die im Unterzeichnungsprotokoll vom 11. Dezember 1973 aufgeführt werden und damit Bestandteil des gesamten Vertragswerks sind. Der eine Briefwechsel betrifft "humanitäre Fragen", d.h. insbesondere die Frage der Ausreise deutscher Volkszugehöriger aus der CSSR in die Bundesrepublik Deutschland. ...Der andere Briefwechsel betrifft die Einbeziehung von Berlin (West) in das Vertragswerk.¹¹¹

The legal position is different with regard to the Unilateral Czechoslovak Letter on Criminal Prosecution.

111. Kimminich, Der Prager Vertrag, loc.cit., p. 66. E.t.: Art. V of the Prague Treaty embodies important statements of intent with regard to the further development of German-Czechoslovak relations. It does not contain any material-legal provision. However, in connection with Art. V of the Prague Treaty, two exchanges of letters between the Federal Republic of Germany and Czechoslovakia must be noted which are referred to in the signed protocol dated December 11, 1973 and, therefore, become integral part of the treaty. One exchange of letters deals with "humanitarian questions", i.e., especially the question concerning the emigration of people of German ethnic origin from Czechoslovakia to the Federal Republic of Germany. ...The other exchange of letters deals with the inclusion of Berlin (West) in the treaty.

This letter did not realize the aspects described above of a one-sided legal transaction. It merely informed the Federal Government of Czechoslovakia's legal position and therefore did not create any obligation.¹¹² The letter is nevertheless an instrument of quasi-legal relevance since Czechoslovakia bound herself by own official information, i.e. the Czechoslovak authorities may not interpret their legal position in the question of criminal prosecution of punishable offences committed between 1938 and 1945 in any other way, nor can they alter her legal position by legislative measures.

112. This notwithstanding, that unilateral declarations can create legal obligations is an accepted principle, most recently expressed by the International Court of Justice in the Nuclear Tests Case (Australia v. France) of December 20, 1974.

"The Court must...form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation... In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests.... The validity of these statements and their legal consequences must be considered within...the confidence and trust which are so essential in the relations among States.... The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect" (I.C.J. Reports, 1974, p. 269).

d) Berlin (West)

Most of the treaties which the Federal Republic of Germany concludes with the States of the West are applicable to Berlin (West) as well. She also represents Berlin (West) in international law through her diplomatic missions in these States. The States of the Eastern Bloc do not accept this. Therefore, during the negotiations, the mentioned crises arose over the question of Berlin¹¹³ the German Government denied that West Berlin be covered by the Treaty with Czechoslovakia and juristic and natural persons of West Berlin to be represented by the consular mission of the Federal Republic.

The aim of the Federal Government was duly to comply with the request of the Federal Constitutional Court -contained in its ruling on the Basic Treaty with the German Democratic Republic- by demanding full consular representation of West Berlin. Thus, the organs acting for the Federal Government are basically obliged to insist on the inclusion of Berlin (West) in any agreement or treaty whose context allows them to be extended to include the State of Berlin (West) and its citizens, and also to sign any such agreement or treaty only if there is no curtailment of the legal status of Berlin (West) and its citizens, as

113. See Part I at pp. 68-9 and f.n.90 of this thesis.

delineated by the provisions of the Constitution - but subject to the Allies' proviso regarding Berlin, and in accordance with the Four-Power Agreement of September 3, 1971.¹¹⁴

Finally, a quite unsatisfactory compromise was reached with the exchange of the notes of November 23/27, 1973¹¹⁵ and the exchange of letters on the extension of Articles II and V of the Treaty to Berlin (West).¹¹⁶ The text of the notes exchanged on November 23/27, 1973 confirms that agreement was reached only on the principle of a provision concerning the question of cooperation in legal matters, leaving details thereof to be elaborated in later negotiations, as is the case with regard to Moscow, too. As emphasised by both parties in the German-Czechoslovak exchange of notes, these negotiations are not to start until after diplomatic relations are re-established.

In all the agreements concerning the establishment of diplomatic relations, the Federal Government had up to this point made its right to representation of Berlin (West) a pre-condition of the re-establishment of relations. In the case of Poland, it was thought that it might be sufficient

114. BVerfGE 36,1.

115. See Part I, f.n.90 of this thesis.

116. Law Gazette II, p. 994.

to refer mutually to the Berlin Agreement. But when in practice it turned out that the Polish Government refused to allow the legal business of West Berlin courts to be dealt with through German consulates, the German Foreign Office decided from then on to make other agreements on the establishment of diplomatic relations totally dependent on the settlement first of the question of consular representation. The West German Government had in fact demanded this, basing itself on international conventions, especially Article 5 of the Vienna Convention on Consular Relations of 1963 - which expressly provides that juridical persons shall also enjoy consular protection.¹¹⁷

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117. "Consular functions consist in...protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law..." (UN Doc. A/CONF. 25/12, April 23, 1963).

Blumenwitz writes in this connection: "Bei der Anwendung der zitierten Vorschrift auf die Rechtslage Westberlins ergeben sich einmal Schwierigkeiten aus der Tatsache, dass die Wiener Konvention über konsularische Beziehungen zwischen den Signatarstaaten des Viermächte-Abkommens vom 3. September 1971 nicht gilt, zum anderen, dass in der (allerdings umstrittenen) Regelung im Viermächte-Abkommen eine Spezialregelung gesehen werden kann, die gegebenenfalls Art. 5 der Wiener Konvention und dem darin enthaltenen allgemeinen Völkerrechtsgrundsatz vorgehen würde" (Jahrbuch 1975, p. 196, f.n. 130).

E.t.: When applying the cited provision to the legal position of West Berlin, difficulties arise, first of all, from the fact that the Vienna Convention on Consular relations does not apply as between the signatory states of the Four Power Agreement of September 3, 1971; secondly, from the fact that the provision (the subject of controversy) contained in the Four Power Agreement may be regarded as a special provision which, in turn, would possibly take precedence over Art. 5 of the Vienna Convention and the general principle of international law contained therein.

But the Czechoslovak Government opposed it, and the Federal Government had to give in. The question of legal cooperation should be resolved not in the wake of Berlin's representation through Bonn, but in the same way as any other bilateral issue. The issue of legal assistance has on March 15, 1977 not yet been regulated in a treaty with Czechoslovakia. Meanwhile, legal assistance but only in civil or commercial matters concerning Czechoslovakia is being handled in the same way as it was prior to establishing diplomatic relations. German as well as Czechoslovak applications for legal assistance are made through the Czechoslovak Military Mission of Berlin (West), based on Articles 8-16 (Letters rogatory), of the Convention relating to civil procedure, March 1, 1954.¹¹⁸ Mutual legal assistance in criminal matters takes place without contractual regulation and is connected with difficulties.

Because of Berlin, the Treaty itself was only able to achieve that Article II of the Treaty, in accordance with the Quadripartite Agreement of September 3, 1971 applied

118. Haager Übereinkommen über den Zivilprozess, Law Gazette 1958 II p. 577. French text: Convention relative à la procédure civile. Faite à la Haye, le 1^{er} mars 1954. E.t.: Convention relating to civil procedure. Done at the Hague, on March 1, 1954; United Nations Treaty Series, Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, Vol. 286 (1958) pp. 265-289.

Article 8 of the Convention (*loc.cit.* p. 271) runs as follows: "In civil or commercial matters, the judicial authority of one contracting State may, in conformity with the provisions of its legislation, communicate by letter rogatory with the competent authority of another contracting State, in order to request that it carry out, within its limits of its jurisdiction, either an investigation or some other form of judicial act."

Information was also given to the author by the German Foreign Office (file number 214-507-E).

also to West Berlin and that both parties would negotiate further in each individual case with regard to the extension of other treaties to Berlin (West) within the meaning of Article V. This regulation is consistent with the Quadripartite Agreement.

Although the Treaty itself does not deal directly with the consular representation of the inhabitants of West Berlin, this question was brought to a close in connection with the establishment of diplomatic relations between the Federal Republic and the CSSR.¹¹⁹

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119. Erklärung des Bundesausseueministers vor dem Bundestag (explanation of the Federal Minister for Foreign Affairs before the FD), March 27, 1974 (BR-Drucksache 7/1832, Tz. 7/6008 B). The Minister stated:

"Zunächst möchte ich feststellen, dass die konsularische Betreuung unserer Mitbürger aus Berlin durch die Bundesrepublik Deutschland in der Tschechoslowakei nicht Gegenstand des Vertrages ist. Diese Frage stellte sich...im Zusammenhang mit der Aufnahme diplomatischer Beziehungen...die...inzwischen erfolgt ist."

E.t.: To begin with I must observe that the consular representation of our co-citizens from Berlin through the Federal Republic of Germany in Czechoslovakia is not the subject of the treaty. This issue is related to the establishment of diplomatic relations...which has already taken place.

This declaration means that by establishing diplomatic relations in anticipation of the Treaty of Normalisation, section 2a) of Schedule IV of the Quadripartite Agreement on Berlin has come into force. According to this provision, the Federal Republic of Germany is empowered to carry out consular duties for people permanently resident in the West sectors of Berlin.

The Federal Council's criticism of the exchange of letters on West Berlin is largely unfounded. The representative of Bavaria made the criticism that the applicability of subsequent treaties to West Berlin had to be negotiated individually. But it is legally impossible to provide that treaties concluded in the future will apply as well to West Berlin, since the assent of the West Berlin authorities is necessary in each individual case.¹²⁰ Moreover, the Constitution of the Federal Republic does not apply to Berlin.¹²¹

The criticism of the Federal Council during the 409th session of July 1, 1974, that the total consular representation of West Berlin by the Federal Republic was not confirmed by the German Czechoslovak Treaty,¹²² seems unfounded as well, because it was not possible to obtain a better arrangement. It is a fact that the Quadripartite Agreement on Berlin does not mention legal persons, with the consequence that different interpretations on this point between the Federal Republic and the States of the Eastern Bloc arose. As long as these different interpretations are not settled by an agreement between the Federal Republic and the Soviet Union there is little hope that an agreement with Czechoslovakia on this question can be reached.¹²³

120. Strupp-Schlochauer (f.n.28), Bd. 1, p. 183.

121. Berber (f.n.62), Bd. I, p. 126.

122. BR-Drucksache 490 (new), tn. 301 D.

123. Paragraph 2 lit. a) of the Communication from the Government of the Union of Soviet Socialist Republics

to the Governments of the French Republic, the United Kingdom and the United States of America in Annex IV B of the Quadripartite Agreement prescribes: "Provided that matters of security and status are not affected, for its part it will raise no objection to:...The performance by the Federal Republic of Germany of consular service for permanent residents of the Western Sectors of Berlin" (Documentation Relating to the Federal Government's Policy of Détente, p. 105).

Even Carstens, an acknowledged University Lecturer in Public Law, (former Parliamentary Leader of the CDU-CSU faction in the German Federal Diet, and since December 1976 President of the Federal Diet), starts from the presupposition that the Four Power Agreement covers only the consular representation of natural persons through the Federal Republic when he states that the consular representation of West Berlin citizens falls under the foreign policy competence of the Federal Republic (Carstens, Zur Interpretation der Berlin-Regelung von 1971, loc.cit. p. 78).

3) Significance and shortcomings of the Treaty

The Federal Chancellor, Herr Brandt, said on December 11, 1973 in Prague:

Der Vertrag, den wir heute gemeinsam unterzeichnet haben, und unsere Gespräche sind Ausdruck des politischen Willens, mit der Normalisierung und weiteren Entwicklung der Beziehungen zwischen unseren Ländern zugleich auch den Frieden in Europa zu festigen. Beides, der Vertrag und das politische Ziel, gehören zusammen. Sie bilden eine Einheit.

Machen wir uns jedoch nichts vor: Tief eingewurzelt Misstrauen lässt sich nicht von heute auf morgen überwinden. Es regt sich immer wieder, und keiner weiss, wie lange noch. Das macht unsere gemeinsame Aufgabe um so wichtiger.¹²⁴

For centuries Bohemia and Moravia were territories where Germans and Czechs lived side by side. Even before the idea of nationalism played a role there were bloody disturbances between the two peoples. After the French Revolution the problem of nationalities in these territories became acute, and the atmosphere was poisoned more and more by the actions of the Government of Austria-Hungary and of

124. Presse- und Informationsamt der Bundesregierung, p. 50. E.t.: The Treaty we have jointly signed today, and our discussions, are also an expression of the political will, together with the normalizing and further development of the relations between our countries, at the same time to strengthen peace in Europe. Both -the Treaty and the political will- are interconnected. They constitute a single entity.

However, do not let us harbour any illusions. Deeply rooted distrust cannot be overcome overnight. It springs up time and again, and no one knows for how long it will continue to do so. This makes our joint task all the more important (Press and Information Office of the FG, p. 36).

the Czechoslovak Government after World War I to secure the domination of one nationality over the other. The only solution to the problem of nationalities might have been to grant far-reaching autonomy in domestic affairs and to pursue a neutralist course in foreign affairs.

The territorial separation of both nationalities did not result in a humanitarian solution of the problem, because the two nationalities were not separated into two distinct territories. On the contrary, they lived together as a mixed population since for centuries they had belonged to the same state. Consequently, a territorial separation had to be accompanied by the evacuation of the respective minority group from each of the territories. This necessarily meant hardship and suffering for many people.

The ethnic German population of Czechoslovakia numbering more than 3 million was expelled from the territory of Czechoslovakia with the exception of a comparatively small number of Germans who were allowed to remain. This put an enormous strain on relations between the two States.

These expellees in the "Charter of the Expellees" appealed to their right to their homeland (Recht auf die

Heimat).¹²⁵ The resolution contained a demand for the acquisition of German nationality on the basis of equality until these people were allowed to return to their homeland,¹²⁶ demands for a nationalities law¹²⁷ and an appeal to the moral responsibility of nations to solve their expellee problems.¹²⁸

125. This was passed on August 5, 1950 by the Central Committee of expelled Germans and the United Group of East Germans, in Cannstatt, Germany (J.f.I.R. 3, 1954, p. 181).

126. "Wir haben unsere Heimat verloren...Wir fühlen uns berufen zu verlangen, dass das Recht auf die Heimat als eines der...Grundrechte der Menschheit anerkannt und verwirklicht wird. Solange dieses Recht für uns nicht verwirklicht ist...fordern wir,...gleiches Recht als Staatsbürger, nicht nur vor dem Gesetz, sondern auch in der Wirklichkeit des Alltages" (loc.cit. Preamble and No. 1). E.t.: We have lost our homeland... We feel called upon to demand that the "right to the homeland" be recognized and realized as one of the fundamental human rights. As long as this right has not been realized for us...we demand...the same rights as citizens, not only legally, but also in the reality of everyday living.

127. "...Einbau aller Heimatvertriebenen in das Leben des Deutschen Volkes". (loc.cit. No. 3). E.t.:...assimilation of all expellees in the life of the German people.

128. "Die Völker der Welt sollen ihre Mitverantwortung am Schicksal der Heimatvertriebenen empfinden,...sollen handeln, wie es ihrem Gewissen entspricht. Die Völker müssen anerkennen, dass das Schicksal der deutschen Heimatvertriebenen...ein Weltproblem ist, dessen Lösung höchste sittliche Verantwortung und Verpflichtung...erfordert" (loc.cit. No. 4). E.t.: The peoples of the world should realize their responsibility for the fate of the expellees,...should deal with this problem as their conscience dictates. The peoples must realize that the fate of the German expellees is a world problem, whose solution demands the highest moral responsibility and obligation.

To be sure, international law does not recognize a 'right to a homeland'. Strupp-Schlochauer considers it as a most difficult one to determine legally, and one would have to agree with this point of view.¹²⁹

129. Strupp-Schlochauer (f.n.28), Bd. 2, p. 506-7.

Bülck (Das Recht auf Heimat), loc.cit. p. 74) writes: "Die Stellungnahme der internationalen Wissenschaft zur Umsiedlung und zum Recht auf die Heimat spiegelt im Grunde nur die Entwicklung wider, in die der gesamte völkerrechtliche Minderheitenschutz seit dem Ende des zweiten Weltkrieges geraten ist. In der westlichen Welt beginnt er, sich in einem allgemeinen individualistisch-humanitären Diskriminierungsverbot aufzulösen. Das Recht der Minderheiten, ihre nationalen, religiösen und kulturellen Eigenarten und Überlieferungen als selbständige Gruppen positiv zu entfalten, das noch einen wesentlichen Bestandteil der Schutzverträge nach dem ersten Weltkrieg gebildet hatte, verschwindet heute hinter den allgemeinen Menschenrechten mit ihrem bloss negativen Schutz gegen willkürliche Eingriffe in die persönliche Freiheit des Einzelnen. Für den Gedanken der Sesshaftigkeit einer Volksgruppe in ihrem angestammten Siedlungs- und Kulturraum, ihrer Heimat, ist in dieser Begriffswelt kein Platz."

E.t.: The attitude of international learned circles with regard to the question of resettlement and the right to one's native land only reflects the development that since the Second World War has influenced the whole of international law concerning the protection of minorities. In the Western World the latter is beginning to dissolve itself into a general individualistic-humanitarian ban against all discrimination. The right of minorities to develop their own national, religious and cultural individuality and heritage as independent groups - a right which after the Second World War made up a considerable proportion of the agreements of protectorates - today disappears behind the general rights of man with their negative safeguard against arbitrary interference with the personal liberties of the individual. The concept of an ethnic group being entitled to reside in its land of origin - its native country - has no place in this world of clichés.

The true historical importance of the German Czechoslovak Treaty is that the Federal Republic accepted the solution of the problem of nationalities in Czechoslovakia created by the expulsion, and renounced any territorial claims against Czechoslovakia (Article IV of the Treaty). Thus, the solution of the problem of the Germans in Czechoslovakia effected by force in 1945, is acknowledged as final and irrevocable, removing one of the most serious controversies of Central Europe. The Czechs' realization that they pursued the solution of the question of nationalities in a most inhumane manner and their consequent fear of revenge, have poisoned for years German Czechoslovak relations. The elimination of this incrimination through the German acceptance of the solution of the Sudeten problem was a concession by the Federal Republic which was not reciprocated by the Czech Government, insofar as the question of emigration of the remaining Germans in the CSSR is concerned.

If a solution to the German-Czech problem of nationality were to have been found, it would have had to have been all-encompassing and included those Germans still living in Czechoslovakia.

Czechoslovakia, having undertaken the solution of the Sudeten problem by expelling more than three million Germans and demanding that the Federal Republic accept this expulsion,

cannot refuse morally to allow the remaining Germans to emigrate.

The problem of nationalities will not be finally solved until all Germans who want to emigrate are allowed to do so. The opposition justly reproached the Federal Government for not defending the German position on this matter more forcefully. Needless to say, a policy which strives for a total solution to the problem of nationalities must grant the right of emigrate to the Germans still residing in Czechoslovakia.

However, this defect can be remedied by Czechoslovakia's complete compliance with paragraph 2 of the exchange of letters on humanitarian questions.

The solution to the problem of the Munich Agreement represents a positive compromise. Certainly, the Treaty makes it possible for the CSSR to assert once again the contention that the Munich Agreement had been void from the beginning. This appears to be merely a face-saving device, however, since all juridical consequences resulting from the ex tunc invalidity of the Munich Agreement are excluded by the Treaty.

With regard to the success in overcoming the problem of nationalities and all other problems which have arisen since 1938, the remaining sections of the Treaty are of less importance since they deal with day-to-day questions. They are reflective of the policy of détente and serve to enhance

the development of economic relations. These provisions of the Treaty embodied in the framework of the new East-West relationship will be realized to the extent that the policy of détente succeeds. In any event, the Federal Republic has made a contribution to détente by recognizing definitively the situation produced by World War II and its aftermath in Czechoslovakia.

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Gesetz

zu dem Vertrag vom 11. Dezember 1973 über die gegenseitigen Beziehungen zwischen der Bundesrepublik Deutschland und der Tschechoslowakischen Sozialistischen Republik

Vom 12. Juli 1974

Der Bundestag hat das folgende Gesetz beschlossen:

Artikel 1

Dem in Prag am 11. Dezember 1973 unterzeichneten Vertrag über die gegenseitigen Beziehungen zwischen der Bundesrepublik Deutschland und der Tschechoslowakischen Sozialistischen Republik einschließlich der dazugehörigen Briefwechsel vom selben Tage

- über die Erstreckung der Geltung des Artikels II des Vertrages und der Verträge, die sich aus der Verwirklichung des Artikels V des Vertrages ergeben werden, auf Berlin (West),
 - über die Regelung humanitärer Fragen,
- wird zugestimmt. Der Vertrag, die beiden Briefwechsel sowie der Brief der Regierung der Tsche-

choslowakischen Sozialistischen Republik über Fragen der Strafverfolgung werden nachstehend veröffentlicht.

Artikel 2

Dieses Gesetz gilt, soweit die Regelungen des Vertragswerks für das Land Berlin gelten, auch im Land Berlin, sofern das Land Berlin die Anwendung dieses Gesetzes feststellt.

Artikel 3

- (1) Dieses Gesetz tritt am Tage nach seiner Verkündung in Kraft.
- (2) Der Tag, an dem der Vertrag nach seinem Artikel VI in Kraft tritt, ist im Bundesgesetzblatt bekanntzugeben.

Die verfassungsmäßigen Rechte des Bundesrates sind gewahrt.

Das vorstehende Gesetz wird hiermit verkündet.

Bonn, den 12. Juli 1974

Der Bundespräsident
Scheel

Der Bundeskanzler
Schmidt

Der Bundesminister des Auswärtigen
Genscher

Vertrag
über die gegenseitigen Beziehungen
zwischen der Bundesrepublik Deutschland
und der Tschechoslowakischen Sozialistischen Republik

Smlouva
o vzájemných vztazích
mezi Spolkovou republikou Německa
a Československou socialistickou republikou

Die Bundesrepublik Deutschland

und

die Tschechoslowakische Sozialistische Republik —

IN DER HISTORISCHEN ERKENNTNIS, daß das harmonische Zusammenleben der Völker in Europa ein Erfordernis des Friedens bildet,

IN DEM FESTEN WILLEN, ein für allemal mit der unheilvollen Vergangenheit in ihren Beziehungen ein Ende zu machen, vor allem im Zusammenhang mit dem Zweiten Weltkrieg, der den europäischen Völkern unermessliche Leiden zugefügt hat,

ANERKENNEND, daß das Münchener Abkommen vom 29. September 1938 der Tschechoslowakischen Republik durch das nationalsozialistische Regime unter Androhung von Gewalt aufgezwungen wurde,

ANGESICHTS DER TATSACHE, daß in beiden Ländern eine neue Generation herangewachsen ist, die ein Recht auf eine gesicherte friedliche Zukunft hat,

IN DER ABSICHT, dauerhafte Grundlagen für die Entwicklung gutnachbarlicher Beziehungen zu schaffen,

IN DEM BESTREBEN, den Frieden und die Sicherheit in Europa zu festigen,

IN DER UBERZEUGUNG, daß die friedliche Zusammenarbeit auf der Grundlage der Ziele und Grundsätze der Charta der Vereinten Nationen dem Wunsche der Völker sowie dem Interesse des Friedens in der Welt entspricht —

sind wie folgt übereingekommen:

Artikel I

Die Bundesrepublik Deutschland und die Tschechoslowakische Sozialistische Republik betrachten das Münche-

Spolková republika Německa

a

Československá socialistická republika

poučeny historií, že mír vyžaduje harmonické soužití národů Evropy,

v pevné vůli jednou provždy skoncovat s neblahou minulostí ve svých vztazích, především v souvislosti s druhou světovou válkou, která přinesla nezměrné útrapy evropským národům,

uznávajice, že mnichovská dohoda z 29. září 1938 byla Československé republice vnucena nacistickým režimem pod hrozbou síly,

uvědomujice si, že v obou zemích vyrostla nová generace, která má právo na zajištěnou mírovou budoucnost,

vedeny úmyslem vytvořit trvalé základy pro rozvoj dobrých sousedských vztahů,

ve snaze upevnit mír a bezpečnost v Evropě,

přesvědčeny, že mírová spolupráce na základě cílů a zásad Charty Organizace spojených národů odpovídá tužbám národů a zájmům míru ve světě,

se dohodly takto:

Článek I

Spolková republika Německa a Československá socialistická republika považují mnichovskou dohodu z 29. září

ner Abkommen vom 29. September 1938 im Hinblick auf ihre gegenseitigen Beziehungen nach Maßgabe dieses Vertrages als nichtig.

Artikel II

(1) Dieser Vertrag berührt nicht die Rechtswirkungen, die sich in bezug auf natürliche oder juristische Personen aus dem in der Zeit vom 30. September 1938 bis zum 9. Mai 1945 angewendeten Recht ergeben.

Ausgenommen hiervon sind die Auswirkungen von Maßnahmen, die beide vertragsschließende Parteien wegen ihrer Unvereinbarkeit mit den fundamentalen Prinzipien der Gerechtigkeit als nichtig betrachten.

(2) Dieser Vertrag läßt die sich aus der Rechtsordnung jeder der beiden Vertragsparteien ergebende Staatsangehörigkeit lebender und verstorbener Personen unberührt.

(3) Dieser Vertrag bildet mit seinen Erklärungen über das Münchener Abkommen keine Rechtsgrundlage für materielle Ansprüche der Tschechoslowakischen Sozialistischen Republik und ihrer natürlichen und juristischen Personen.

Artikel III

(1) Die Bundesrepublik Deutschland und die Tschechoslowakische Sozialistische Republik lassen sich in ihren gegenseitigen Beziehungen sowie in Fragen der Gewährleistung der Sicherheit in Europa und in der Welt von den Zielen und Grundsätzen, die in der Charta der Vereinten Nationen niedergelegt sind, leiten.

(2) Demgemäß werden sie entsprechend den Artikeln 1 und 2 der Charta der Vereinten Nationen alle ihre Streitfragen ausschließlich mit friedlichen Mitteln lösen und sich in Fragen, die die europäische und internationale Sicherheit berühren, sowie in ihren gegenseitigen Beziehungen der Drohung mit Gewalt oder der Anwendung von Gewalt enthalten.

Artikel IV

(1) In Übereinstimmung mit den vorstehenden Zielen und Grundsätzen bekräftigen die Bundesrepublik Deutschland und die Tschechoslowakische Sozialistische Republik die Unverletzlichkeit ihrer gemeinsamen Grenze jetzt und in der Zukunft und verpflichten sich gegenseitig zur uneingeschränkten Achtung ihrer territorialen Integrität.

(2) Sie erklären, daß sie gegeneinander keinerlei Gebietsansprüche haben und solche auch in Zukunft nicht erheben werden.

Artikel V

(1) Die Bundesrepublik Deutschland und die Tschechoslowakische Sozialistische Republik werden weitere Schritte zur umfassenden Entwicklung ihrer gegenseitigen Beziehungen unternehmen.

(2) Sie stimmen darin überein, daß eine Erweiterung ihrer nachbarschaftlichen Zusammenarbeit auf den Gebieten der Wirtschaft, der Wissenschaft, der wissenschaftlich-technischen Beziehungen, der Kultur, des Umweltschutzes, des Sports, des Verkehrs und ihrer sonstigen Beziehungen in ihrem beiderseitigen Interesse liegt.

Artikel VI

Dieser Vertrag bedarf der Ratifikation und tritt am Tage des Austausches der Ratifikationsurkunden in Kraft, der in Bonn stattfinden soll.

1938 vzhledem ke svým vzájemným vztahům podle této Smlouvy za nulitní.

Článek II

(1) Tato Smlouva se nedotýká právních účinků, které vyplývají vůči fyzickým nebo právnickým osobám z práva použitého v době od 30. září 1938 do 9. května 1945.

Vyňaty z toho jsou účinky opatření, které obě smluvní strany považují pro jejich neslučitelnost se základními zásadami spravedlnosti za nulitní.

(2) Tato Smlouva ponechává nedotčenu státní příslušnost žijících a zemřelých osob, která vyplývá z právního řádu každé z obou smluvních stran.

(3) Tato Smlouva netvoří svými prohlášeními o mnichovské dohodě právní základnu pro materiální nároky Československé socialistické republiky a jejich fyzických a právnických osob.

Článek III

(1) Spolková republika Německa a Československá socialistická republika se řídí ve svých vzájemných vztazích i v otázkách zajištění bezpečnosti v Evropě a ve světě cíli a zásadami zakotvenými v Chartě Organizace spojených národů.

(2) V souladu s tím budou podle článku 1 a 2 Charty Organizace spojených národů řešit všechny své spory výlučně mírovými prostředky a vystříhají se hrozby silou nebo použití síly v otázkách, které se týkají evropské a světové bezpečnosti, jakož i ve svých vzájemných vztazích.

Článek IV

(1) Spolková republika Německa a Československá socialistická republika v souladu s výše uvedenými cíli a zásadami potvrzují neporušitelnost svých společných hranic nyní i v budoucnu a vzájemně se zavazují neomezeně respektovat svou územní celistvost.

(2) Prohlašují, že nemají vůči sobě žádné územní nároky a nebudou takové nároky vznášet ani v budoucnu.

Článek V

(1) Spolková republika Německa a Československá socialistická republika podniknou další kroky k širokému rozvoji svých vzájemných vztahů.

(2) Jsou zajedno v tom, že rozšíření jejich sousedské spolupráce v oblasti hospodářství, vědy, vědeckotechnických styků, kultury, ochrany prostředí, sportu, dopravy a jiných styků je v zájmu obou stran.

Článek VI

Tato Smlouva podléhá ratifikaci a vstoupí v platnost dnem výměny ratifikačních listin, která má být provedena v Bonnu.

ZU URKUND DESSEN haben die Bevollmächtigten der Vertragsparteien diesen Vertrag unterschrieben.

Na důkaz toho zmocnění smluvních stran tuto Smlouvu podepsali.

GESCHEHEN zu Prag am 11. Dezember 73 in zwei Urschriften, jede in deutscher und tschechischer Sprache, wobei jeder Wortlaut gleichermaßen verbindlich ist.

Dáno v Praze dne 11. prosince 73 ve dvou vyhotoveních, každé v jazyce německém a českém, přičemž obě znění mají stejnou platnost.

Für die
Bundesrepublik Deutschland

Za
Spolkovou republiku Německa

Willy Brandt
Walter Scheel

Für die
Tschechoslowakische Sozialistische Republik

Za
Československou socialistickou republiku

Strougal
B. Chňoupek

Sehr geehrter Herr Minister,

ich habe die Ehre, im Namen der Regierung der Bundesrepublik Deutschland das in den Verhandlungen erzielte Einvernehmen darüber zu bestätigen, daß die Geltung des Artikels II des heute unterzeichneten Vertrages über die gegenseitigen Beziehungen zwischen der Bundesrepublik Deutschland und der Tschechoslowakischen Sozialistischen Republik entsprechend dem Viermächte-Abkommen vom 3. September 1971 in Übereinstimmung mit den festgelegten Verfahren auf Berlin (West) erstreckt wird.

Die Bundesrepublik Deutschland und die Tschechoslowakische Sozialistische Republik nehmen in Aussicht, die Erstreckung der Verträge, die sich aus der Verwirklichung des Artikels V dieses Vertrages ergeben werden, entsprechend dem Viermächte-Abkommen vom 3. September 1971 in Übereinstimmung mit den festgelegten Verfahren auf Berlin (West) in jedem einzelnen Falle zu vereinbaren.

Ich bitte Sie, mir Ihr Einvernehmen hiermit zu bestätigen.

Genehmigen Sie, Herr Minister, die Versicherung meiner ausgezeichnetsten Hochachtung.

Walter Scheel

An den
Minister für Auswärtige Angelegenheiten
der Tschechoslowakischen Sozialistischen Republik
Herrn Dipl.-Ing. Bohuslav Chňoupek

Vážený pane ministře,

mám čest jménem vlády Spolkové republiky Německa potvrdit shodu dosaženou v jednáních, že platnost článku II dnes podepsané Smlouvy o vzájemných vztazích mezi Spolkovou republikou Německa a Československou socialistickou republikou bude rozšířena podle Čtyřstranné dohody z 3. září 1971 v souladu se stanovenými procedurami na Berlín (Západní).

Spolková republika Německa a Československá socialistická republika hodlají sjednávat v každém jednotlivém případě rozšíření smluv, které vyplynou z realizace článku V této Smlouvy, na Berlín (Západní) podle Čtyřstranné dohody z 3. září 1971 v souladu se stanovenými procedurami.

Prosím, abyste mi s tímto potvrdil Váš souhlas.

Přijměte, pane ministře, projev mé hluboké úcty.

Walter Scheel

Vážený pan
Ing. Bohuslav Chňoupek
ministr zahraničních věcí
Československé socialistické republiky

Sehr geehrter Herr Minister,

Ich habe die Ehre, im Namen der Regierung der Tschechoslowakischen Sozialistischen Republik den Empfang Ihres Briefes vom heutigen Tage zu bestätigen, der folgenden Wortlaut hat:

„Ich habe die Ehre, im Namen der Regierung der Bundesrepublik Deutschland das in den Verhandlungen erzielte Einvernehmen darüber zu bestätigen, daß die Geltung des Artikels II des heute unterzeichneten Vertrages über die gegenseitigen Beziehungen zwischen der Bundesrepublik Deutschland und der Tschechoslowakischen Sozialistischen Republik entsprechend dem Viermächte-Abkommen vom 3. September 1971 in Übereinstimmung mit den festgelegten Verfahren auf Berlin (West) erstreckt wird.

Die Bundesrepublik Deutschland und die Tschechoslowakische Sozialistische Republik nehmen in Aussicht, die Erstreckung der Verträge, die sich aus der Verwirklichung des Artikels V dieses Vertrages ergeben werden, entsprechend dem Viermächte-Abkommen vom 3. September 1971 in Übereinstimmung mit den festgelegten Verfahren auf Berlin (West) in jedem einzelnen Falle zu vereinbaren.

Ich bitte Sie, mir Ihr Einvernehmen hiermit zu bestätigen.“

Die Regierung der Tschechoslowakischen Sozialistischen Republik ist damit einverstanden.

Genehmigen Sie, Herr Minister, die Versicherung meiner ausgezeichnetsten Hochachtung.

B. Chňoupek

An den
Bundesminister des Auswärtigen
der Bundesrepublik Deutschland
Herrn Walter Scheel

Vážený pane spolkový ministrě,

mám čest potvrdit jménem vlády Československé socialistické republiky příjem Vašeho dopisu z dnešního dne, který má toto znění:

«Mám čest jménem vlády Spolkové republiky Německa potvrdit shodu dosaženou v jednáních, že platnost článku II dnes podepsané Smlouvy o vzájemných vztazích mezi Spolkovou republikou Německa a Československou socialistickou republikou bude rozšířena podle Čtyřstranné dohody z 3. září 1971 v souladu se stanovenými procedurami na Berlín (Západní).

Spolková republika Německa a Československá socialistická republika hodlají sjednávat v každém jednotlivém případě rozšíření smluv, které vyplynou z realizace článku V této Smlouvy, na Berlín (Západní) podle Čtyřstranné dohody z 3. září 1971 v souladu se stanovenými procedurami.

Prosím Vás, abyste mi s tímto potvrdil Váš souhlas».

Vláda Československé socialistické republiky s tím souhlasí.

Přijměte, pane spolkový ministrě, projev mé hluboké úcty.

B. Chňoupek

Vážený pan
Walter Scheel
spolkový ministr zahraničí
Spolkové republiky Německa

Sehr geehrter Herr Minister,

im Zusammenhang mit der heutigen Unterzeichnung des Vertrages über die gegenseitigen Beziehungen zwischen der Bundesrepublik Deutschland und der Tschechoslowakischen Sozialistischen Republik habe ich die Ehre, Ihnen unter Bezugnahme auf Art. V dieses Vertrages mitzuteilen, daß bei den Vertragsverhandlungen Übereinstimmung in folgenden Fragen erzielt worden ist:

1. Im Rahmen ihrer Bemühungen um die Entwicklung der gegenseitigen Beziehungen werden die Regierung der Bundesrepublik Deutschland und die Regierung der Tschechoslowakischen Sozialistischen Republik den humanitären Fragen Aufmerksamkeit zuwenden.
2. Die tschechoslowakische Seite hat erklärt, daß die zuständigen tschechoslowakischen Stellen Anträge tschechoslowakischer Bürger, die auf Grund ihrer deutschen Nationalität die Aussiedlung in die Bundesrepublik Deutschland wünschen, im Einklang mit den in der Tschechoslowakischen Sozialistischen Republik geltenden Gesetzen und Rechtsvorschriften wohlwollend beurteilen werden.

Die deutsche Seite hat erklärt, daß in Übereinstimmung mit den in der Bundesrepublik Deutschland geltenden Gesetzen und Rechtsvorschriften Personen tschechischer oder slowakischer Nationalität, die dies wünschen, in die Tschechoslowakische Sozialistische Republik ausiedeln können.

3. Es gibt keine Einwände seitens der beiden Regierungen, daß das Deutsche Rote Kreuz und das Tschechoslowakische Rote Kreuz die Lösung der oben erwähnten Fragen fördern.
4. Beide Regierungen werden den Reiseverkehr zwischen den beiden Ländern weiterentwickeln, einschließlich der Verwandtenbesuche.
5. Beide Regierungen werden Möglichkeiten technischer Verbesserungen im Reiseverkehr prüfen, einschließlich einer zügigen Abfertigung an den Grenzübergangsstellen sowie der Eröffnung weiterer Grenzübergänge.
6. Der Inhalt dieses Briefwechsels wird sinngemäß entsprechend dem Viermächte-Abkommen vom 3. September 1971 in Übereinstimmung mit den festgelegten Verfahren auch auf Berlin (West) angewandt.

Ich bitte Sie, mir den Inhalt dieses Briefes zu bestätigen.

Genehmigen Sie, Herr Minister, die Versicherung meiner ausgezeichnetsten Hochachtung.

Walter Scheel

An den
Minister für Auswärtige Angelegenheiten
der Tschechoslowakischen Sozialistischen Republik
Herrn Dipl.-Ing. Bohuslav Chňoupek

Vážený pane ministře,

v souvislosti s dnešním podpisem Smlouvy o vzájemných vztazích mezi Spolkovou republikou Německa a Československou socialistickou republikou mám čest sdělit Vám s odvoláním na článek V této Smlouvy, že bylo dosaženo při smluvních jednáních shody v těchto otázkách:

1. V rámci svých snah o rozvoj vzájemných vztahů budou věnovat vláda Spolkové republiky Německa a vláda Československé socialistické republiky pozornost humanitním otázkám.
2. Československá strana prohlásila, že příslušná československá místa budou blahovonně posuzovat v souladu se zákony a právními předpisy, platnými v Československé socialistické republice, žádosti československých občanů, kteří si na základě své německé národnosti přejí vystěhovat se do Spolkové republiky Německa.

Německá strana prohlásila, že v souladu se zákony a právními předpisy, platnými ve Spolkové republice Německa, mohou osoby české či slovenské národnosti, které si to přejí, vystěhovat se do Československé socialistické republiky.

3. Ze strany obou vlád není námitek proti tomu, aby Německý červený kříž a Československý červený kříž napomáhaly řešení výše zmíněných otázek.
4. Obě vlády budou dále rozvíjet cestovní ruch mezi oběma zeměmi včetně návštěv příbuzných.
5. Obě vlády budou zkoumat možnosti technických zlepšení v cestovním ruchu, včetně plynulého odbavování na hraničních přechodech, jakož i otevření dalších hraničních přechodů.
6. Obsah těchto vyměněných dopisů bude dle svého smyslu aplikován podle Čtyřstranné dohody z 3. září 1971, v souladu se stanovenými procedurami též na Berlín (Západní).

Prosím Vás, abyste mi potvrdil obsah tohoto dopisu.

Přijměte, velevážený pane ministře, projev mé hluboké úcty.

Walter Scheel

Vážený pan
Ing. Bohuslav Chňoupek
ministr zahraničních věcí
Československé socialistické republiky

Sehr geehrter Herr Minister,

Ich habe die Ehre, im Namen der Regierung der Tschechoslowakischen Sozialistischen Republik den Empfang Ihres Briefes vom heutigen Tage zu bestätigen, der folgenden Wortlaut hat:

„Im Zusammenhang mit der heutigen Unterzeichnung des Vertrages über die gegenseitigen Beziehungen zwischen der Bundesrepublik Deutschland und der Tschechoslowakischen Sozialistischen Republik habe ich die Ehre, Ihnen unter Bezugnahme auf Art. V dieses Vertrages mitzuteilen, daß bei den Vertragsverhandlungen Übereinstimmung in folgenden Fragen erzielt worden ist:

1. Im Rahmen ihrer Bemühungen um die Entwicklung der gegenseitigen Beziehungen werden die Regierung der Bundesrepublik Deutschland und die Regierung der Tschechoslowakischen Sozialistischen Republik den humanitären Fragen Aufmerksamkeit zuwenden.

2. Die tschechoslowakische Seite hat erklärt, daß die zuständigen tschechoslowakischen Stellen Anträge tschechoslowakischer Bürger, die auf Grund ihrer deutschen Nationalität die Aussiedlung in die Bundesrepublik Deutschland wünschen, im Einklang mit den in der Tschechoslowakischen Sozialistischen Republik geltenden Gesetzen und Rechtsvorschriften wohlwollend beurteilen werden.

Die deutsche Seite hat erklärt, daß in Übereinstimmung mit den in der Bundesrepublik Deutschland geltenden Gesetzen und Rechtsvorschriften Personen tschechischer oder slowakischer Nationalität, die dies wünschen, in die Tschechoslowakische Sozialistische Republik aussiedeln können.

3. Es gibt keine Einwände seitens der beiden Regierungen, daß das Deutsche Rote Kreuz und das Tschechoslowakische Rote Kreuz die Lösung der oben erwähnten Fragen fördern.

4. Beide Regierungen werden den Reiseverkehr zwischen den beiden Ländern weiterentwickeln, einschließlich der Verwandtenbesuche.

5. Beide Regierungen werden Möglichkeiten technischer Verbesserungen im Reiseverkehr prüfen, einschließlich einer zügigen Abfertigung an den Grenzübergangsstellen sowie der Eröffnung weiterer Grenzübergänge.

6. Der Inhalt dieses Briefwechsels wird sinngemäß entsprechend dem Viermächte-Abkommen vom 3. September 1971 in Übereinstimmung mit den festgelegten Verfahren auch auf Berlin (West) angewandt.

Ich bitte Sie, mir den Inhalt dieses Briefes zu bestätigen.“

Die Regierung der Tschechoslowakischen Sozialistischen Republik ist damit einverstanden.

Genehmigen Sie, Herr Minister, die Versicherung meiner ausgezeichnetsten Hochachtung.

B. Chňoupek

Vážený pane spolkový ministrě,

mám čest potvrdit jménem vlády Československé socialistické republiky příjem Vašeho dopisu z dnešního dne, který má toto znění:

„V souvislosti s dnešním podpisem Smlouvy o vzájemných vztazích mezi Spolkovou republikou Německa a Československou socialistickou republikou mám čest sdělit Vám s odvoláním na článek V této Smlouvy, že bylo dosaženo při smluvních jednáních shody v těchto otázkách:

1. V rámci svých snah o rozvoj vzájemných vztahů budou věnovat vláda Spolkové republiky Německa a vláda Československé socialistické republiky pozornost humanitním otázkám.

2. Československá strana prohlásila, že příslušná československá místa budou blahovlnně posuzovat v souladu se zákony a právními předpisy, platnými v Československé socialistické republice, žádosti československých občanů, kteří si na základě své německé národnosti přejí vystěhovat se do Spolkové republiky Německa.

Německá strana prohlásila, že v souladu se zákony a právními předpisy, platnými ve Spolkové republice Německa, mohou osoby české či slovenské národnosti, které si to přejí, vystěhovat se do Československé socialistické republiky.

3. Ze strany obou vlád není námitek proti tomu, aby Německý červený kříž a Československý červený kříž napomáhaly řešení výše zmíněných otázek.

4. Obě vlády budou dále rozvíjet cestovní ruch mezi oběma zeměmi včetně návštěv příbuzných.

5. Obě vlády budou zkoumat možnosti technických zlepšení v cestovním ruchu, včetně plynulého odbavování na hraničních přechodech, jakož i otevření dalších hraničních přechodů.

6. Obsah těchto vyměněných dopisů bude dle svého smyslu aplikován podle Čtyřstranné dohody z 3. září 1971, v souladu se stanovenými procedurami též na Berlín (Západní).

Prosím Vás, abyste mi potvrdil obsah tohoto dopisu.“

Vláda Československé socialistické republiky s tím souhlasí.

Přijměte, pane spolkový ministrě, projev mé hluboké úcty.

B. Chňoupek

An den
Bundesminister des Auswärtigen
der Bundesrepublik Deutschland
Herrn Walter Scheel

Vážený pan
Walter Scheel
spolkový ministr zahraničí
Spolkové republiky Německa

Sehr geehrter Herr Minister,

anlässlich der heutigen Unterzeichnung des Vertrages zwischen der Tschechoslowakischen Sozialistischen Republik und der Bundesrepublik Deutschland über ihre gegenseitigen Beziehungen habe ich die Ehre, Sie im Namen der Regierung der Tschechoslowakischen Sozialistischen Republik über folgendes zu unterrichten:

Von den in den Jahren 1938 bis 1945 verübten strafbaren Handlungen können nach gültigem tschechoslowakischem Recht gegenwärtig nur noch solche Taten verfolgt werden, die nach dem tschechoslowakischen Strafgesetz strafbar sind, für die das Gesetz die Todesstrafe vorsieht und die zugleich die Merkmale von Kriegsverbrechen oder Verbrechen gegen die Menschlichkeit im Sinne des Artikels 6 Buchstaben b und c des Statuts des Internationalen Militärgerichtshofs in Nürnberg erfüllen. Für Taten dieser Art verjährt die Strafverfolgung nicht.

In allen übrigen Fällen ist die Strafverfolgung spätestens im Jahre 1965 verjährt. An diesem Zustand wird dieser Vertrag nichts ändern.

Genehmigen Sie, Herr Minister, die Versicherung meiner ausgezeichnetsten Hochachtung.

B. Chňoupek

An den
Bundesminister des Auswärtigen
der Bundesrepublik Deutschland
Herrn Walter Scheel

Vážený pane spolkový ministře,

při příležitosti dnešního podpisu Smlouvy o vzájemných vztazích mezi Československou socialistickou republikou a Spolkovou republikou Německa mám čest oznámit Vám jménem vlády Československé socialistické republiky toto:

Podle platného československého práva mohou být z trestných činů spáchaných v letech 1938 až 1945 v současné době stíhány jen ty, které jsou trestné podle československého trestního zákona, za které zákon předvidá trest smrti a které mají současně znaky válečných zločinů nebo zločinů proti lidskosti ve smyslu článku 6 písmeno b) a c) statutu Mezinárodního vojenského soudu v Norimberku. Trestní stíhání pro takové trestné činy se nepromlčuje.

Ve všech jiných případech je trestní stíhání nejpozději v roce 1965 promlčeno. Na tomto stavu tato Smlouva nic nezmění.

Přijměte, pane spolkový ministře, projev mé hluboké úcty.

B. Chňoupek

Vážený pan
Walter Scheel
spolkový ministr zahraničí
Spolkové republiky Německa

LAW CONCERNING THE TREATY OF DECEMBER 11, 1973 ON MUTUAL
RELATIONS BETWEEN THE FEDERAL REPUBLIC OF GERMANY AND THE
CZECHOSLOVAK SOCIALIST REPUBLIC, JULY 12, 1974

The Federal Diet passed the following law:

Article 1

The Treaty on the Mutual Relations between the Federal Republic of Germany and the Czechoslovak Socialist Republic signed in Prague on December 11, 1973, including the Exchange of Letters of the same day

- on the Extension of the Validity of Article II of the Treaty as well as the Treaties resulting from the realization of Article V of the Treaty to Berlin (West)

- on the Provisions for the Settlement of Humanitarian Questions

has been approved. The Treaty and the two Exchanges of Letters, as well as the Letter of the Government of the Czechoslovak Socialist Republic concerning Questions of Prosecution will be published hereafter.

Article 2

This law is applicable in the Federal State of Berlin as well, in so far as the provisions of this treaty are valid for the Federal State of Berlin and provided that the Federal State of Berlin recognizes the application of this law.

Article 3

- (1) This law comes into force on the day after its promulgation.
- (2) The day on which the treaty comes into force according to the provisions of Article VI is indicated in the Law Gazette.

The constitutional rights of the Federal Council are ensured.

The law as it appears above is herewith published.

Bonn, July 12, 1974

The Federal President

Scheel

The Federal Chancellor

Schmidt

The Foreign Minister

Genscher

TREATY ON MUTUAL RELATIONS BETWEEN THE FEDERAL REPUBLIC
OF GERMANY AND THE CZECHOSLOVAK SOCIALIST REPUBLIC

The Federal Republic of Germany and the Czechoslovak Socialist Republic,

In the historic awareness that the harmonious coexistence of the nations in Europe is a necessity for peace,

Determined to put an end once and for all to the disastrous past in their relations, especially in connexion with the Second World War which has inflicted immeasurable suffering on the peoples of Europe,

Recognizing that the Munich Agreement of 29 September 1938 was imposed on the Czechoslovak Republic by the National Socialist regime under the threat of force,

Considering the fact that a new generation has grown up in both countries which has a right to a secure and peaceful future,

Intending to create lasting foundations for the development of good-neighbourly relations,

Anxious to strengthen peace and security in Europe,

Convinced that peaceful co-operation on the basis of the purposes and principles of the United Nations Charter complies with the wishes of nations and the interests of peace in the world,

Have agreed as follows:

Article I

The Federal Republic of Germany and the Czechoslovak Socialist Republic, under the present Treaty, deem the Munich Agreement of 29 September 1938 void with regard to their mutual relations.

Article II

(1) The present Treaty shall not affect the legal effects on natural or legal persons of the law as applied in the period between 30 September 1938 and 9 May 1945.

This provision shall exclude the effects of measures which both Contracting Parties deem to be void owing to their incompatibility with the fundamental principles of justice.

(2) The present Treaty shall not affect the nationality of living or deceased persons ensuing from the legal system of either of the two Contracting Parties.

(3) The present Treaty, together with its declarations on the Munich Agreement, shall not constitute any legal basis for material claims by the Czechoslovak Socialist Republic and its natural and legal persons.

Article III

(1) The Federal Republic of Germany and the Czechoslovak Socialist Republic shall in their mutual relations as well as in matters of ensuring European and international security be guided by the purposes and principles embodied in the United Nations Charter.

(2) Accordingly they shall, pursuant to Articles 1 and 2 of the United Nations Charter, settle all their disputes exclusively by peaceful means and shall refrain from any threat or use of force in matters affecting European and international security, and in their mutual relations.

Article IV

(1) In conformity with the said purposes and principles, the Federal Republic of Germany and the Czechoslovak Socialist Republic reaffirm the inviolability of their common frontier now and in the future and undertake to respect each other's territorial integrity without restriction.

(2) They declare that they have no territorial claims whatsoever against each other and that they will not assert any such claims in the future.

Article V

(1) The Federal Republic of Germany and the Czechoslovak Socialist Republic will undertake further steps for the comprehensive development of their mutual relations.

(2) They agree that an extension of their neighbourly co-operation in the economic and scientific fields, in their scientific and technological relations, and in the fields of culture, environmental protection, sport, transport and in other sectors of their relations, is in their mutual interest.

Article VI

The present Treaty shall be subject to ratification and enter into force on the date of the exchange of instruments of ratification which shall take place in Bonn.

In witness whereof the Plenipotentiaries of the Contracting Parties have signed this Treaty.

Done in Prague on 11 December 1973 in duplicate in the German and Czech languages, both texts being equally authentic.

For the Federal Republic
of Germany

Willy Brandt

Walter Scheel

For the Czechoslovak
Socialist Republic

Strougal

B. Chnoupek

EXCHANGE OF LETTERS (of the two Ministers of Foreign Affairs)
OF ARTICLES II AND V OF THE TREATY TO BERLIN (WEST)¹

Mr. Minister,

On behalf of the Government of the Federal Republic of Germany I have the honour to confirm the agreement reached in the negotiations that the validity of Article II of the Treaty signed today on Mutual Relations between the Federal Republic of Germany and the Czechoslovak Socialist Republic shall, consistent with the Quadripartite Agreement of 3 September 1971, be extended to Berlin (West) in accordance with established procedures.

The Federal Republic of Germany and the Czechoslovak Socialist Republic propose to agree in each individual case on the extension to Berlin (West), consistent with the Quadripartite Agreement of 3 September 1971, of treaties arising out of the implementation of the provisions of Article V of the present Treaty, in accordance with established procedures.

I would ask you to confirm your agreement to the above.

Accept, Mr. Minister, the assurances of my highest consideration.

Walter Scheel

Mr. Bohuslav Chnoupek Eng.,
Minister of Foreign Affairs
of the Czechoslovak Socialist Republic

1. In addition to Document No. 1, section 2.

Mr. Minister,

On behalf of the Government of the Czechoslovak Socialist Republic I have the honour to confirm receipt of your letter of today's date, which reads as follows:

"On behalf of the Government of the Federal Republic of Germany I have the honour to confirm the agreement reached in the negotiations that the validity of Article II of the Treaty signed today on Mutual Relations between the Federal Republic of Germany and the Czechoslovak Socialist Republic shall, consistent with the Quadripartite Agreement of 3 September 1971, be extended to Berlin (West) in accordance with established procedures.

The Federal Republic of Germany and the Czechoslovak Socialist Republic propose to agree in each individual case on the extension to Berlin (West), consistent with the Quadripartite Agreement of 3 September 1971, of treaties arising out of the implementation of the provisions of Article V of the present Treaty, in accordance with established procedures.

I would ask you to confirm your agreement to the above."

The Government of the Czechoslovak Socialist Republic agrees to the above.

Accept, Mr. Minister, the assurances of my highest consideration.

B. Chnoupek

Herr Walter Scheel,
Minister for Foreign Affairs
of the Federal Republic of Germany

No. 3COMMUNIQUE OF THE ESTABLISHMENT OF DIPLOMATIC RELATIONS

The Foreign Office of the Federal Republic of Germany issued the following communiqué:

The Governments of the Federal Republic of Germany and the Czechoslovak Socialist Republic have agreed to establish diplomatic relations as of today and to open embassies in Prague and Bonn. The two countries will soon nominate their representatives with the rank of Ambassador.

Prague, 11 December 1973

No. 4

ARTICLE 116. PARAGRAPH 1 OF THE CONSTITUTIONAL LAW
(GRUNDGESETZ) OF THE FEDERAL REPUBLIC OF GERMANY,

MAY 23, 1949

According to this Constitutional Law (Grundgesetz) a German citizen is, under the reservation of another regulation by law, anyone who is in possession of German nationality or who has established permanent residence in the territory of the German Reich within the boundaries of December 31, 1937² either as a refugee (Flüchtling), as a displaced person (Vertriebener) of German affiliation (Volkszugehörigkeit) or as his marital partner or descendant.

-
2. The "Gesetz über die Angelegenheiten der Vertriebenen und Flüchtlinge" (Law Relating to the Affairs of Displaced persons and Refugees), May 19, 1953 (Law Gazette I, p. 201) in the classification of the several groups of people who have come from the East to the Federal Republic of Germany differentiates between "Vertriebener" (displaced persons) and "Heimatvertriebener" (expellee) on the one side and "Flüchtling" (refugee) on the other. The expression "refugee" is

applied exclusively to those people who come from the territory which belongs now to the German Democratic Republic. The same law also defined "Volkszugehörigkeit" (affiliation). The relevant paragraphs are as follows (extracts only):

Paragraph 1. A displaced person is one, who, as a German citizen or German affiliated person (Volkszugehöriger) had his permanent residence... (or exercised his business or profession) in the German eastern provinces, now under foreign administration, or outside the boundaries of the German Reich according to the territorial status of December 31, 1937 and who lost it subsequently in connection with the events of the Second World War in consequence of expulsion, in particular by deportation (Ausweisung) or escape (Flucht) ... The same rule shall apply to German citizens or affiliated people who, after the general measures of expulsion had ended, left Czechoslovakia. Excluded from this category of people are persons who took up residence there after May 8, 1945. ... The same rule shall also apply to people who, although not German citizens or affiliated persons, are married to a displaced person according to the first definition.

Paragraph 2. An expellee is a displaced person, who had on or before December 31, 1937 his permanent residence in territory which on January 1, 1914 belonged to the German Reich or to the Austro-Hungarian Monarchy... (Additional prescriptions exist for marital partners and descendants). ...

Paragraph 6. A German affiliated person is an individual who in his native land avowed German nationality (Volkstum), provided that this avowal was confirmed by certain facts such as birth (Abstammung), language, education and culture (see for comparison f.n. to Document No. 13).

STATUTE RELATING TO THE SETTLEMENT OF QUESTIONS OF NATIONALITY,FEBRUARY 22, 1955 (Excerpts)

First Section. The state of nationality of persons affiliated with the German people who had been granted German citizenship in the years from 1938 to 1945 by collective naturalization.

Article 1. The German affiliated persons to whom German nationality has been granted by terms as follows:

a) Treaty between the German Reich and the Czechoslovak Republic on Questions of Nationality and Option,³ November 20, 1938 (Law Gazette II, p. 895), ...

c) Decree on the acquisition of German Nationality by former Czechoslovak citizens affiliated to the German people, April 20, 1939 (Law Gazette I p. 815)⁴ in connection with the statute settling the questions of nationality relating to the Protectorate of Bohemia and Moravia of June 6, 1941 (Law Gazette I, p. 308), ...:

such persons have become German citizens in consequence of the aforesaid provisions if they have not refused and do not refuse German nationality by explicit declaration.

3. See Document No. 7.

4. See Document No. 13.

The same rule is applicable to the wife and the children who, according to German law, derive their nationality from a person who is entitled to refuse German nationality. It is irrelevant whether he makes use of his right of refusal or not. Wives who possessed German nationality at the moment of marriage will retain it.

Article 2. If a person entitled to decline German citizenship has met the conditions which entail the loss of German nationality and does not exercise this right, then he has been in possession of German nationality only until these conditions entailing its loss set in.

Article 3. The refusal produces the effect that the refusing person has not acquired German nationality as provided in Article 1.

Article 4. If a person entitled to refuse German nationality has met those conditions which entail the acquisition of German nationality before he exercises his right to refuse, a subsequent refusal means that he became a German citizen at the time that the conditions for the acquisition of German nationality were met.

Article 5. Subsequent to the effective date of this Statute the refusal can be declared only within a year's time.

Every person entitled to refuse is authorized to waive the right of refusal before the expiration of the time-limit.

Second Section. Conditions of nationality concerning those persons who are Germans according to Article 116, paragraph 1 of the Constitutional Law⁵ without possessing German citizenship.

Article 6. Any person who, according to Article 116, paragraph 1 of the Constitutional Law, is a German without however possessing German nationality has to become naturalized on (his) application, unless there is evidence, justifying the supposition that he will endanger the internal or external security of the Federal Republic or of a German Federal State.

The petitioner loses the legal status of a German citizen at the very moment when the decision to refuse the naturalization is without appeal.

Article 7. If a German not possessing German nationality has deliberately left the territory of the German Reich as defined by the boundaries of December 31, 1937 (Germany) and has taken up permanent residence in the foreign country from whose territory he was exiled or in any of the other countries mentioned in Paragraph 1, Article 2 No. 3 of the Federal Statute on expellees,⁶ he loses the legal status of a German as defined in the Constitutional Law at the moment when this statute comes into effect.

5. See Document No. 4.

6. For the exact title of the Statute, see f.n.2. Czechoslovakia is also "another country" in this sense.

If the permanent residence is changed, according to the principles defined in paragraph 1 and after this statute comes into effect, the loss of the legal status of a German as defined in the Constitutional Law comes into effect at the moment of the change of residence.

Third Section. Conditions of nationality of other categories of persons.

Article 8. An affiliated person of the German nation, who is not a German as defined in the Constitutional Law but who has his permanent residence in Germany and who cannot be expected to return to his native country, has a claim to naturalization as provided in Article 6. If he is naturalized, his marital partner also has a claim to naturalization.

If the permanent residence in Germany is abandoned after this statute comes into force, the legal claim to naturalization lapses from the moment such residence is abandoned.

Article 9. An affiliated person of the German nation, who is not a German as defined in the Constitutional Law, is permitted to apply for naturalization from abroad if he has the legal status of an expellee under Article 1 of the Federal Statute on expellees. ...

Fourth Section. Procedural Rules...

Article 14. Any person who has completed the 18th year of his life attains majority as far as the exercise of the right to refuse..to disclaim and to assert his claim ... to naturalization is concerned. ...

Article 15. Any person who has not yet completed the 18th year of his life or who is indeed more than 18 years old but legally incapable of exercising his majority or who, apart from reasons other than minority, is limited in his legal capacity will be represented by his legal representative for personal affairs.

The guardian of an illegitimate child needs the assent of the child's mother if she is entitled to care for the child and has the custody of the child's person.

The same procedure is necessary if the guardian does not use the claim of refusal and the claim of naturalization. If a consensus between the guardian and the mother cannot be reached, the guardian is obliged to present the matter for decision by a Guardianship Court.

Article 16. The declaration of one marital partner does not need the assent of the other marital partner. ...

Fifth Section. Interim and final provisions

Article 25. The domestic law on expellees and the future provisions on nationality resulting from it are not affected by the declaration deposited under this statute. ...

Note: In accordance with the legal requirements under Article 113 of the Constitutional Law, the Federal Government has given its assent to the preceding Statute. ...

AGREEMENT CONCLUDED AT MUNICH ON SEPTEMBER 29, 1938

Germany, the United Kingdom, France and Italy, taking into consideration the agreement, which has been already reached in principle for the cession to Germany of the Sudeten German territory, have agreed on the following terms and conditions governing the said cession and the measures consequent thereon, and by this agreement they each hold themselves responsible for the steps necessary to secure its fulfillment:

1. The evacuation will begin on the 1st October.
2. The United Kingdom, France and Italy agree that the evacuation of the territory shall be completed by the 10th October, without any existing installations having been destroyed and that the Czechoslovak Government will be held responsible for carrying out the evacuation without damage to the said installations.
3. The conditions governing the evacuation will be laid down in detail by an international commission composed of representatives of Germany, the United Kingdom, France, Italy and Czechoslovakia.
4. The occupation by stages of the predominantly German territory by German troops will begin on the 1st October. The four territories marked on the attached map will be occupied by German troops in the following order: the territory marked No. I on the 1st and 2nd October,

the territory marked No. II on the 2nd and 3rd of October, the territory marked No. III on the 3rd, 4th and 5th of October, the territory marked No. IV on the 6th and 7th of October. The remaining territory of preponderantly German character will be ascertained by the aforesaid international commission forthwith and be occupied by German troops by the 10th of October.

5. The international commission referred to in paragraph 3 will determine the territories in which a plebiscite is to be held. These territories will be occupied by international bodies until the plebiscite has been completed. The same commission will fix the conditions in which the plebiscite is to be held, taking as a basis the conditions of the Saar plebiscite. The commission will also fix a date, not later than the end of November, on which the plebiscite will be held.

6. The final determination of the frontiers will be carried out by the international commission. This commission will also be entitled to recommend to the four Powers, Germany, the United Kingdom, France and Italy, in certain exceptional cases minor modifications in the strictly ethnographical determination of the zones which are to be transferred without plebiscite.

7. There will be a right of option into and out of the transferred territories, the option to be exercised within six months from the date of this agreement. A German-Czechoslovak commission shall determine the details of the option,

consider ways of facilitating the transfer of population and settle questions of principle arising out of the said transfer.

8. The Czechoslovak Government will within a period of four weeks from the date of this agreement release from their military and police forces any Sudeten Germans who may wish to be released, and the Czechoslovak Government will within the same period release Sudeten German prisoners who are serving terms of imprisonment for political offences.

Adolf Hitler
Neville Chamberlain
Edouard Daladier
Benito Mussolini

Munich, September 29, 1938

Annex to the Agreement

His Majesty's Government in the United Kingdom and the French Government have entered into the above agreement on the basis that they stand by the offer, contained in paragraph 6 of the Anglo-French proposals of the 19th September, relating to an international guarantee of the new boundaries of the Czechoslovak State against unprovoked aggression.

When the question of the Polish and Hungarian minorities in Czechoslovakia has been settled, Germany and Italy for their part will give a guarantee to Czechoslovakia.

Adolf Hitler
Neville Chamberlain
Edouard Daladier
Benito Mussolini

Munich, September 29, 1938

Declaration

The Heads of the Governments of the four Powers declare that the problems of the Polish and Hungarian minorities of Czechoslovakia, if not settled within three months by agreement between the respective Governments, shall form the subject of another meeting of the Heads of the Governments of the four Powers here present.

Munich, September 29, 1938

Adolf Hitler
Neville Chamberlain
Edouard Daladier
Benito Mussolini

Supplementary Declaration

All questions which may arise out of the transfer of the territory shall be considered as coming within the terms of reference to the international commission.

Munich, September 29, 1938

Adolf Hitler
Neville Chamberlain
Edouard Daladier
Benito Mussolini

No. 7

TREATY BETWEEN THE GERMAN REICH AND THE CZECHOSLOVAK REPUBLIC
ON QUESTIONS OF NATIONALITY AND OPTION, NOVEMBER 20, 1938

(Excerpts)

...

Article 1. Czechoslovak citizens who on October 10, 1938 had their permanent residence in a community united with the German Reich, acquire as of October 10, 1938 German nationality while losing their Czechoslovak citizenship, if

- a) they were born in the territory united with the German Reich before January 1, 1910, or
- b) have lost German nationality as of January 10, 1920, or
- c) are descendants of a person to whom the provisions under the letters a) and b) can be applied, or
- d) are wives of persons to whom the provisions of the letters a) b) or c) mentioned above can be applied.

Czechoslovak citizens who are affiliated persons with the German nation and who have had their permanent residence outside the former Czechoslovak territory acquire as of October 10, 1938 German nationality while losing their Czechoslovak citizenship if they possessed the right of domicile in a community united with the German Reich on October 10, 1938. A wife does not acquire German nationality, unless her husband acquires it.

Article 2. The German Government can request up till July 10, 1939 that persons who are not affiliated persons with the German nation, but who, under the provisions of this Treaty, remain Czechoslovak citizens and who since January 1, 1910 have immigrated to the territory united to the German Reich together with their descendants of Czechoslovak nationality, leave the German Reich within three months. The Czechoslovak Government will admit these persons to its territory.

The Czechoslovak Government can request up till July 10, 1939 that affiliated persons with the German nation, who by the time this treaty comes into effect are Czechoslovak citizens and who after January 1, 1910 immigrated into the present territory of the Czechoslovak Republic, as well as their descendants, leave the Czechoslovak Republic within three months. These persons thereby lose their Czechoslovak nationality; the German Government will admit them to its territory. This provision is not applicable to persons who acquired Czechoslovak nationality after January 30, 1933 and who have been German or Austrian citizens up to this date.

Article 3. Persons of non-German affiliation who under Article 1 acquire German nationality are allowed to opt for Czechoslovak nationality until March 29, 1939.

Article 4. Affiliated persons with the German nation who remain Czechoslovak citizens can opt for German nationality until March 29, 1939. This cannot be applied to persons who acquire Czechoslovak nationality after January 30, 1933 and who have been up to this date German or Austrian citizens.

Article 5. The option is declared

a) for Czechoslovak nationality at the Ministry of the Interior in Prague if the declaration is made within the Czechoslovak Republic,
outside the Czechoslovak Republic at the competent Czechoslovak Mission.

b) for German nationality at the competent minor administrative board when the declaration is made within the German Reich; outside the German Reich at the competent German consulate. ...

Article 7. The declaration of option has to be made to or given in written form to the competent authorities mentioned under Article 5. The signature under the declaration requires formal attestation either by the official mission of the State in favour of which the option is exercised, or by a court of law, or by a notary. The option can also be declared by an authorized representative. ...

Article 8. The competent authority of the State in favour of which the option is exercised, examines whether the requirements for the option are fulfilled. In the Czechoslovak Republic the examination is reserved to the Ministry of the Interior in Prague.

If the requirements for the option are met, the administrative body immediately hands over a document of option to the optant and informs the authority appointed by the other Government.

In the document of option also the members of family referred to in the option have to be mentioned.

The option becomes effective with the receipt of the declaration of option by the authority of option. ...

Article 9. Any person who has completed the 18th year of his life is entitled to make a declaration of option.

A married woman cannot opt separately; the option of the husband is effective for the wife as well. This is, however, not applicable if the conjugal community is suspended by order of the court.

For persons under 18 years of age, for minors more than 18 years old who meet the requirements for legal incapacitation and for other persons legally incapacitated or provisionally placed under the care of a guardian,,the option is declared by their legal representative, even if they are not entitled to opt. For the assessment of the requirements for a declaration of option under this paragraph the time of the receipt of the declaration by the competent authority is decisive.

Article 10. An option cannot be revoked.

(Exceptions). ...

Article 13. For the examination and treatment of all questions resulting from the implementation of this treaty, a mixed committee will be constituted to which each of the two Governments delegates an equal number of representatives.
...

Article 14. This treaty comes into effect on November 26, 1938.

LAW CONCERNING THE REUNIFICATION OF THE SUDETEN GERMAN
TERRITORIES WITH THE GERMAN REICH, NOVEMBER 21, 1938

(Excerpts)

...Article I

The Sudeten German territories reunited with the Reich
are territories of the German Reich.

Article II

With this Reunification the former inhabitants of the
Sudeten German territories become German citizens in
accordance with other provisions still to be issued.

Article III

(Contains the authorization, given to the Reichs-
Minister of the Interior to issue such provisions).⁷ ...

Berchtesgaden, November 21, 1938

The Fuehrer and Chancellor of the Reich

Adolf Hitler

The Reich Minister of the Interior

Frick

The Reich Minister for Foreign Affairs

von Ribbentrop

The Representative of the Fuehrer

R. Hess

7. See Document No. 13.

TEXT OF AGREEMENT BETWEEN HITLER AND HACHA, SIGNED ON15 MARCH 1939

The Fuehrer and Reichskanzler to-day received in Berlin, at their own request, the President of the Czechoslovak State, Dr. Hacha, and the Czechoslovak Foreign Minister, Dr. Chvalkovsky, in the presence of Herr von Ribbentrop, the Reich Foreign Minister. At this meeting the serious situation which had arisen, in consequence of the events of recent weeks, within the territory which had hitherto formed part of Czechoslovakia was subjected to a completely frank examination. The conviction was unanimously expressed on both sides that the object of all their efforts must be to assure quiet, order and peace in this part of Central Europe. The President of the Czechoslovak State declared that, in order to serve this end and to reach a final pacification, he confidently placed the fate of the Czech people and of their country in the hands of the Fuehrer of the German Reich. The Fuehrer accepted this declaration and expressed his determination to take the Czech people under the protection of the German Reich and to assure to them the autonomous development of their national life in accordance with their special characteristics.

In witness whereof this document is signed in duplicate.
Berlin, 15 March 1939.

(Signed) Adolf Hitler Dr. Hacha
von Ribbentrop Dr. Chvalkovsky

TEXT OF DECREE DEFINING THE STATUS OF THE PROTECTORATE OF
BOHEMIA AND MORAVIA, ISSUED BY HITLER ON 16 MARCH 1939

For ten centuries the Bohemian-Moravian lands belonged to the living space of the German people. Force and lack of understanding arbitrarily tore them from their old historical surroundings and finally created a source of permanent unrest by incorporating them within the artificial edifice of Czecho-Slovakia. From year to year the danger that a new, appalling menace to European peace would emanate, as had happened once before in the past, from this living space, increased. For the Czecho-Slovak State, and those in power there, had not succeeded in properly organizing the existence side by side of the national groups arbitrarily united within its boundaries and had thereby failed to awaken the interests of all concerned in the maintenance of their common State. It has thereby proved its inmost incapacity to exist and has for this reason now also fallen into actual dissolution.

The German Reich, however, cannot tolerate permanent disturbances in these territories that are so all-important to its own peace and security and also so important to the general well-being and universal peace. Sooner or later the Reich, as the Power most interested and affected, by history and geographical position, would have to suffer the most

serious consequences. Self-preservation, therefore, requires that the German Reich should be determined to intervene decisively in favour of the restoration of a basis for a reasonable Central European order and should take the requisite measures. For it has already proved in the course of its historical past of a thousand years that it alone, thanks to its greatness and to the qualities of the German people, can be called upon to solve these tasks.

Filled with the earnest desire to serve the true interests of the peoples domiciled in this living space, to guarantee the individual national life of the German and of the Czech peoples, to benefit peace and the social welfare of all, I therefore decree the following, in the name of the German Reich, as the basis for the future existence in common of the inhabitants of these territories:-

Article I

1. The territories which formed part of the former Czecho-Slovak Republic and which were occupied by German troops in March 1939 belong henceforth to the territory of the German Reich and come under the latter's protection as the "Protectorate of Bohemia and Moravia".

2. In so far as the defence of the Reich demands, the Leader and Chancellor shall take measures differing from the above in respect of individual parts of these areas.

Article II

1. Inhabitants of the protectorate of German race shall become German nationals and German citizens in accordance with the provisions of the Reich Citizenship Law of the 15th September, 1935. The provisions with regard to safeguarding German blood and German honour shall therefore also apply to them. They shall be subject to German jurisdiction.

2. The remaining inhabitants of Bohemia and Moravia shall be nationals of the Protectorate of Bohemia and Moravia.

Article III

1. The Protectorate of Bohemia and Moravia is autonomous and self-administering.

2. It shall exercise its sovereign rights within the scope of the protectorate in consonance with the political, military and economic importance of the Reich.

3. These sovereign rights shall be represented by its own organs, authorities and officials.

Article IV

The head of the autonomous administration of the Protectorate of Bohemia and Moravia shall enjoy the guard and honours of the head of a State. The head of the Protectorate must possess, in order to exercise his functions, the confidence of the Leader and Chancellor of the Reich.

Article V

1. As trustee of Reich interests the Leader and Chancellor of the Reich shall nominate a "Reich Protector

in Bohemia and Moravia." His seat of office will be Prague.

2. The Reich Protector, as representative of the Leader and Chancellor of the Reich and as Commissioner of the Reich Government, is charged with the duty of seeing to the observance of the political principles laid down by the Leader and Chancellor of the Reich.

3. The members of the Government of the Protectorate shall be confirmed by the Reich Protector. The confirmation may be withdrawn.

4. The Reich Protector is entitled to inform himself of all measures taken by the Government of the Protectorate and to give advice. He can object to measures calculated to harm the Reich and, in case of danger, issue ordinances required for the common interest.

5. The promulgation of laws, ordinances and other legal announcements and the execution of administrative measures and legal judgements shall be annulled if the Reich Protector enters an objection.

Article VI

1. The foreign affairs of the Protectorate, especially the protection of its nationals abroad, shall be taken over by the Reich. The Reich will conduct foreign affairs in accordance with the common interest.

2. The Protectorate shall have a representative accredited to the Reich Government with the title of "minister".

Article VII

1. The Reich shall accord military protection to the Protectorate.

2. In the exercise of this protection the Reich shall maintain garrisons and military establishments in the Protectorate.

3. For the maintenance of internal security and order the Protectorate may form its own organizations. The composition, strength, numbers and arms shall be decided by the Reich Government.

Article VIII

The Reich shall control directly the transport, post and telegraph systems.

Article IX

The Protectorate shall belong to the customs area of the Reich and be subject to its customs sovereignty.

Article X

1. The crown is legal tender, together with the reichsmark, until further notice.

2. The Reich Government shall fix the ratio of one to the other.

Article XI

1. The Reich can issue ordinances valid for the Protectorate in so far as the common interest requires.

2. In so far as a common need exists, the Reich may take over branches of administration and create its own Reich authorities therefor as required.

3. The Reich Government may take measures for the maintenance of security and order.

Article XII

The law at present existing in Bohemia and Moravia shall remain in force so long as it does not conflict with the principle of the assumption of protection by the German Reich.

Article XIII

The Reich Minister of the Interior shall issue, in agreement with the other Ministers concerned, the administrative and legal regulations for the execution and amplification of this decree.

Hitler
Frick

Ribbentrop
Lammers

Prague, March 16 (1939)

No. 11

TELEGRAM FROM THE BRITISH SECRETARY OF STATE FOR FOREIGN AFFAIRS TO THE BRITISH AMBASSADOR IN BERLIN, 17 MARCH 1939

Please inform German Government that His Majesty's Government desire to make it plain to them that they cannot but regard the events of the past few days as a complete repudiation of the Munich Agreement and a denial of the spirit in which the negotiators of that agreement bound themselves to co-operate for a peaceful settlement.

His Majesty's Government must also take this occasion to protest against the changes effected in Czecho-Slovakia by German military action, which are, in their view, devoid of any basis of legality.

No. 12

GERMAN-SLOVAK TREATY SIGNED IN VIENNA ON 18 MARCH AND IN
BERLIN ON 23 MARCH 1939

(a) Text of Treaty regarding the Protection to be extended
by the German Reich to the State of Slovakia, 18 and 23
March 1939

The German Government and the Slovak Government have agreed, after the Slovak State has placed itself under the protection of the German Reich, to regulate by treaty the consequences resulting from this fact. For this purpose the undersigned plenipotentiaries of the two governments have agreed on the following provisions.

Article 1. The German Reich undertakes to protect the political independence of the State of Slovakia and the integrity of its territory.

Article 2. For the purpose of making effective the protection undertaken by the German Reich, the German armed forces shall have the right, at all times, to construct military installations and to keep them garrisoned in the strength they deem necessary, in an area delimited on its western side by the frontiers of the State of Slovakia, and on its eastern side by a line formed by the eastern rims of the Lower Carpathians, the White Carpathians and the Javornik Mountains.

The Government of Slovakia will take the necessary steps to assure that the land required for these installations shall be conveyed to the German armed forces. Furthermore, the Government of Slovakia will agree to grant exemption from custom duties to imports from the Reich for the maintenance of the German troops and the supply of military installations.

Military prerogatives will be exercised by the German armed forces in the zone described in the first paragraph of this Article.

German citizens who, on the basis of private employment contracts, are engaged in the construction of military installations in the designated zone shall be subject in this capacity to German jurisdiction.

Article 3. The Government of Slovakia will organize its military forces in close agreement with the German armed forces.

Article 4. In accordance with the relationship of protection agreed upon, the Government of Slovakia will at all times conduct its foreign affairs in close agreement with the German Government.

Article 5. This treaty shall become effective as from the date of its signature and shall be valid for a period of twenty-five years. The two governments will reach an understanding on the extension of this treaty in due time before the expiration of that period.

In witness whereof the plenipotentiaries of the two parties have signed the above treaty in duplicate.

Vienna, 18 March 1939. Berlin, 23 March 1939.

For the German Government:
von Ribbentrop

For the Slovak Government:
Dr. Josef Tiso
Dr. Vojtech Tuka
Dr. F. Durcansky

(b) (Text of Confidential Protocol concerning Economic and Financial Collaboration between the German Reich and the State of Slovakia, 23 March, 1939).

No. 13

DECREE ON THE ACQUISITION OF GERMAN NATIONALITY BY FORMER CZECHOSLOVAK CITIZENS AFFILIATED WITH THE GERMAN PEOPLE,

APRIL 20, 1939

(Excerpts)

Article 1. Former Czechoslovak citizens of German affiliation (Volkszugehörigkeit)⁸ who, on October 10, 1938 were in possession of the right of domicile (Heimatrecht) in a community to the former Czechoslovak countries Bohemia and Moravia/Silesia acquire German nationality as of March 16, 1939 provided that they have not already acquired it according to paragraph 1 of the German Czechoslovak Agreement

8. A definition of the meaning of "Volkszugehörigkeit" has never been given in a law or any formal order. But the decree issued by the Reich Minister of the Interior from March 29, 1939 declared: "A German (Volkszugehöriger) is an individual who considers himself a member of the German people, provided his avowal is confirmed by certain facts, such as language, education, culture etc." (Gazette Int. Aff. 1939, p. 783.).

on Questions of Nationality and Option for Nationality of November 20, 1938 in force since October 10, 1938 (Law Gazette 1938 II, p. 895).

Article 2. According to paragraph 1, German nationality is not acquired by individuals who, after having lost Czechoslovak nationality, have obtained another nationality or who had their permanent residence in the former Czechoslovak countries of Slovakia or Carpatho-Ukraine on March 16, 1939.

According to paragraph 1, a married woman does not acquire German nationality unless her husband acquired it.

Article 3. German citizens who have their permanent residence in the Protectorate of Bohemia and Moravia also possess the rights of citizens of the Protectorate of Bohemia and Moravia...

No. 14

EXCHANGE OF NOTES BETWEEN THE GOVERNMENT OF GREAT BRITAIN AND CZECHOSLOVAKIA REGARDING THE FORMAL REPUDIATION OF THE MUNICH AGREEMENT BY GREAT BRITAIN, 5 AUGUST 1942.

(a) Note from Eden to Masaryk

Foreign Office, London, 5 August 1942.

Your Excellency,

In the light of recent exchanges of view between our Governments, I think it may be useful for me to make the following statement about the attitude of His Majesty's Government in the United Kingdom as regards Czechoslovakia.

In my letter of the 18th July, 1941, I informed your Excellency that The King had decided to accredit an Envoy Extraordinary and Minister Plenipotentiary to Dr. Benes as President of the Czechoslovak Republic. I explained that this decision implied that His Majesty's Government in the United Kingdom regarded the juridical position of the President and Government of the Czechoslovak Republic as identical with that of the other Allied Heads of States and Governments established in this country. The status of His Majesty's representative has recently been raised to that of an Ambassador.

The Prime Minister had already stated in a message broadcast to the Czechoslovak people on the 30th September, 1940, the attitude of His Majesty's Government in regard to the arrangements reached at Munich in 1938. Mr. Churchill then said that the Munich Agreement had been destroyed by the Germans. This statement was formally communicated to Dr. Benes on the 11th November, 1940.

The foregoing statement and formal act of recognition have guided the policy of His Majesty's Government in regard to Czechoslovakia, but in order to avoid any possible misunderstanding, I desire to declare on behalf of His Majesty's Government in the United Kingdom that as Germany has deliberately destroyed the arrangements concerning Czechoslovakia reached in 1938, in which His Majesty's Government in the United Kingdom participated, His Majesty's

Government regard themselves as free from any engagements in this respect. At the final settlement of the Czechoslovak frontiers to be reached at the end of the war they will not be influenced by any changes effected in and since 1938.

I have, &c.

Anthony Eden.

(b) Masaryk's Reply

5 August 1942

Your Excellency,

I have the honour to acknowledge the receipt of your note of the 5th August, 1942, and I avail myself of this opportunity to convey to your Excellency, on behalf of the Czechoslovak Government and of myself, as well as in the name of the whole Czechoslovak people who are at present suffering so terribly under the Nazi Yoke, the expression of our warmest thanks.

Your Excellency's note emphasizes the fact that the formal act of recognition has guided the policy of His Majesty's Government in regard to Czechoslovakia, but, in order to avoid any possible misunderstanding, His Majesty's Government now desire to declare that, as Germany has deliberately destroyed the arrangements concerning Czechoslovakia reached in 1938, in which His Majesty's Government in the United Kingdom participated, His Majesty's Government regard themselves as free from any engagements in this respect. At the final settlement of the Czechoslovak frontiers

to be reached at the end of the war, they will not be influenced by any changes effected in and since 1938.

My Government accept your Excellency's note as a practical solution of the questions and difficulties of vital importance for Czechoslovakia which emerged between our two countries as the consequence of the Munich Agreement maintaining, of course, our political and juridical position with regard to the Munich Agreement and the events which followed it as expressed in the note of the Czechoslovak Ministry for Foreign Affairs of the 16th December, 1941. We consider your important note of the 5th August, 1942, as a highly significant act of justice towards Czechoslovakia, and we assure you of our real satisfaction and of our profound gratitude to your great country and nation. Between our two countries the Munich Agreement can now be considered as dead.

I have, &c.

Jan Masaryk

No. 15

COMMON DECLARATION OF THE PROVISIONAL GOVERNMENT OF THE
GERMAN DEMOCRATIC REPUBLIC AND THE GOVERNMENT OF THE
CZECHOSLOVAK REPUBLIC, JUNE, 23, 1950.

The Government of the Czechoslovak Republic and the Provisional Government of the German Democratic Republic declare unanimously that they pursue a common fundamental aim, to maintain and secure peace. This common aim is

realized in both countries by a policy of successful reconstruction, which is based on democratic and patriotic efforts and promotes co-operation among all peace- and freedom- loving peoples to strengthen the party of peace, headed by the USSR, in the struggle against the forces of imperialism and war.

In the Czechoslovak Republic the people have definitively achieved victory, the order of the people's democracy has been fortified and the country has successfully started on its way to socialism. In the German Democratic Republic the new anti-fascist-democratic order is being secured. The National Front of Democratic Germany is developing its struggle for the creation of a united, democratic and peace-loving Germany. The Government of Czechoslovakia and the Provisional Government of the German Democratic Republic are convinced that their common obligation to maintain and to secure peace will be facilitated and at the same time strengthened by the fact that there exist no controversial or outstanding problems between the two states.

Our two States have no territorial or boundary claims against one another and their Governments emphasize that the evacuation of the Germans from the Czechoslovak Republic which has taken place is irrevocable, legitimate and definitively terminated.

This declaration is in perfect agreement with the policy the German Democratic Republic has pursued from the outset

and which offered ample opportunities and all kinds of support to evacuated people to join in the reconstruction work and to find a new home in the German Democratic Republic.

Guided by the conviction that their mutual support of peaceful reconstruction benefits the interest of both peoples and of all countries interested in maintaining and securing peace, the Government of the Czechoslovak Republic and the Provisional Government of the German Democratic Republic endeavour to strengthen the ties of friendship between their peoples and states.

Both Governments realize that the struggle of the German people to create a united, democratic and peace-loving Germany as well as the struggle of both states to strengthen the group of countries interested in world peace under the guidance of the most powerful bulwark of peace, the USSR, serves to maintain and secure peace in Europe and in the whole world.

The Government of the Czechoslovak Republic and the Provisional Government of the German Democratic Republic declare that they will mobilize all their efforts to defeat the intentions of the imperialistic war-makers and to consolidate peace.

Prague, June 23, 1950

For the Provisional Government of the German
Democratic Republic

signed: W. Ulbricht

For the Government of the Czechoslovak Republic

signed: A. Zápotocký

DECLARATION OF THE PRESIDENT OF THE CZECHOSLOVAK REPUBLIC
ON THE CESSATION OF THE STATE OF WAR WITH GERMANY,

FEBRUARY 3, 1955.

At the very moment when Hitler's Germany committed aggressive acts against the security, independence and territorial integrity of the CSSR, a state of war between the Czechoslovak Republic and Germany existed.

For more than six years the Czechoslovak people suffered from the occupation of Hitler's Germany and were finally liberated from the fascist yoke by the victorious struggle of the Soviet Union, the decisive force in the anti-Hitler coalition.

After their experiences with German militarism the peoples of Czechoslovakia rightly demand a solution of the German question by which the danger of a renewed threat to peace-loving peoples is made impossible and which guarantees at the same time a peaceful and democratic development for the German people.

The agreement concluded among the four great powers in 1945 in Potsdam, whose aim was the creation of an united Germany resting on democratic and peaceful foundations and the conclusion of a treaty of peace with Germany, indicated the way to these ends.

In contrast to the continuous efforts of the Government of the Soviet Union, the Western Powers made it impossible

to come to an agreement concerning the peaceful reunification of Germany and to conclude a treaty of peace with her.

A decisive obstacle to a peaceful reunification of Germany are the treaties of Paris, which aim at the remilitarization of Western Germany and her integration into aggressive alliances which already exist or are still to be organized.

In view of the fact that broad co-operation between the Czechoslovak Republic and the German Democratic Republic is developing, that mutual understanding and friendship is constantly strengthened, that there exist no contestable and outstanding questions and considering the interest of the peoples of Czechoslovakia to co-operate peacefully with the whole of Germany as well as to create good-neighbourly relations, which could form a durable basis for peaceful coexistence between the peoples of Czechoslovakia and the whole of the German people, I declare in virtue of a decision of the Government:

The state of war between the Czechoslovak Republic and Germany is terminated.

Friendly relations between both countries are established.

The termination of the state of war with Germany does not alter her international obligations and does not violate the rights and obligations of the Czechoslovak Republic which result from the valid international conventions of the four Great Powers concerning Germany and from other international acts concerning Germany in which the Czechoslovak Republic participated.

STATUTE OF KOSICE, APRIL 5, 1945

(Excerpts)

...Chapter VIII

Because of the terrible experiences which the Czechs and Slovaks have had with the German and Hungarian minorities who have to a great extent become the tools of a policy of conquest directed against the Republic from abroad and because of the contribution of the Czechoslovak Germans to a campaign of extermination against the Czech and Slovak peoples, the re-established state of Czechoslovakia finds herself compelled to take far-reaching and lasting measures. The Republic will not and shall not punish the German and Hungarian citizens loyal to her, especially those who remained faithful to her during her hardest times. But she will act severely and inexorably against guilty persons since this is demanded by the conscience of our peoples, the sacred memory of our innumerable martyrs and for the sake of the peace and security of coming generations. Therefore the Government will act according to these principles.

Czechoslovak citizenship is guaranteed to and if necessary the return to the Republic is secured for the following citizens of German or Hungarian nationality who possessed Czechoslovak citizenship before the Munich settlement of 1938; those persons who were anti-fascist and anti-Nazi, those who had offered active resistance against Henlein and Hungarian irredentism and those who led the

struggle on behalf of Czechoslovakia before Munich, those who, after Munich and after March 15, 1939, were persecuted, imprisoned or deported to concentration camps because of their resistance to and struggle against the regime of that time and because of their loyalty to Czechoslovakia, and those who were forced to flee to foreign countries because of German or Hungarian terror and who actively participated in the struggle for the restoration of Czechoslovakia.

Other Czechoslovak citizens of German or Hungarian nationality are deprived of their Czechoslovak citizenship. They may choose to regain Czechoslovak citizenship but the authorities of the Republic reserve to themselves the right to decide on each petition.

Those Germans and Hungarians condemned for a crime against the Republic or against the Czech or Slovak peoples are deprived of Czechoslovak citizenship; they will be deported forever from the Republic unless they are sentenced to death.

Germans and Hungarians who immigrated to the territory of Czechoslovakia after Munich 1938 will be immediately deported from the Republic, unless they are subject to criminal process. Persons who have worked for Czechoslovakia are excepted from this provision.

CONSTITUTIONAL DECREE OF THE PRESIDENT OF THE REPUBLIC No. 33AUGUST 2, 1945

(Excerpts)

On the motion of the Government and in agreement with the Slovak National Council I decree:

Article 1. Czechoslovak citizens of German or Hungarian nationality who under the provisions of a foreign occupying power, acquired German or Hungarian citizenship, lost Czechoslovak citizenship on the day of such acquisition.

The remaining Czechoslovak citizens of German or Hungarian nationality lose Czechoslovak citizenship on the day this decree comes into effect.

This Decree does not apply to Germans or Hungarians who during the time of the increased threat to the Republic registered as Czech or Slovak citizens...

Czechs, Slovaks and members of other Slav peoples, who registered as Germans or Hungarians at that time because of pressure or because of circumstances meriting special consideration, are according to this decree not treated as Germans or Hungarians, provided that the Ministry of the Interior after having investigated the alleged facts, approves the attestation of national loyalty which is issued by the competent National Committee of the District (Administrative Commission of the District).

Article 2. Czechoslovak citizenship is reserved to those persons listed in Article 1 who can prove that they remained

faithful to Czechoslovakia, that they never violated the Czech or Slovak peoples and who can give evidence that they either actively participated in the struggle for liberation or suffered from the Nazi or fascist terror...

The question whether persons of German or Hungarian nationality who are members of the Czechoslovak armed forces retain Czechoslovak citizenship will be decided officially in a short time by the Ministry of the Interior...

Article 3. Persons who under Article 1 have lost their Czechoslovak citizenship can within six months petition for its re-establishment. In cases of such petitions the Ministry of the Interior will decide at its discretion. Petitions will not be accepted, however, if the petitioner has violated the obligations of a Czechoslovak citizen ...

Article 4. For the purpose of this decree married women and minor children are treated separately...

Article 5. Czechs, Slovaks and members of other Slav peoples who during the time of increased threat to the Republic...applied for the acquisition of German or Hungarian nationality without having been forced to do so by outside pressure or extenuating circumstances lose Czechoslovak citizenship as of the day of the issue of this decree.

Article 6. This decree becomes effective on the day of its promulgation. Its implementation is the duty of the

Minister of the Interior in agreement with the Minister of Foreign Affairs and the Minister of National Defence.

(signed) Dr. Benes...

Masaryk...

No. 19

ORDINANCE OF THE GOVERNMENT CONCERNING THE RETURN OF CZECH-OSLOVAK CITIZENSHIP TO PERSONS OF GERMAN NATIONALITY,

NOVEMBER 29, 1949

(Exceprts)

...Article 1. The National Committee of the District can on the application of the National Committee of the Circuit re-confer Czechoslovak citizenship on those persons of German nationality who under the provisions of Article 1 of the Constitutional Decree No. 33/45 lost Czechoslovak citizenship, if they have their permanent residence in the territory of the CSSR and have not violated the obligations of a Czechoslovak citizen, and particularly if they have not committed hostile acts against the people's democracy.

Article 2. The National Committee of the District hands out an attestation to the petitioner who has submitted a petition within the time limit allowed for return of Czechoslovak citizenship to the National Committee of the District of his residence which then declared him a Czechoslovak citizen until the question of his position is settled (provided that none of the obstacles mentioned in Article 1 is present and that it can be supposed on grounds of the petitioner's conduct that he will become an orderly citizen, willing to participate in the endeavours of

reconstruction undertaken by the Czechoslovak working people ; this attestation will also be granted under the same conditions to the members of the family included in the petition....

Article 3. Marital partners can apply in a joint petition for the return of citizenship: the petition of each marital partner has to be decided separately. Children under 15 years of age who are included in the petition together with their parents acquire citizenship together with them....

Article 6. This ordinance comes into effect on the day of its promulgation. It is implemented by the Minister of the Interior in agreement with the other members of the government engaged in this matter.

No. 20

STATUTE ENABLING SOME PERSONS TO ACQUIRE CZECHOSLOVAK
CITIZENSHIP, No. 34, APRIL 24, 1953

The National Assembly of the CSSR has passed the following Statute:

Article 1. Persons of German nationality who under the Decree No. 33/1945 have lost Czechoslovak citizenship and who at the time this statute becomes effective have their permanent residence in the territory of the CSSR become Czechoslovak citizens on the day this law comes into effect, as long as they had not acquired Czechoslovak citizenship heretofore.

Together with the marital partner, eventually with the father or mother, the wives and minor children of the persons mentioned under Paragraph 1 become Czechoslovak citizens, as long as this has not already occurred under the provisions of Paragraph 1, provided that they have their residence in the territory of the CSSR and have not become citizens of another country.

Article 2. This statute comes into effect on the day of its promulgation; its implementation is the concern of the Minister of the Interior.

No. 21

OFFICIAL BULLETIN OF THE MINISTRY OF THE INTERIOR (No. 8/1955)
CONCERNING THE INTERPRETATION OF STATUTE No. 34/1953 ON THE
ACQUISITION OF CZECHOSLOVAK CITIZENSHIP BY SOME PERSONS

(Excerpts)

In response to inquiries from citizens concerning the acquisition of Czechoslovak citizenship under the Statute No. 34/1953, the Ministry of the Interior communicates the following:

Those persons who under the provisions of the aforementioned Statute have acquired Czechoslovak Citizenship become Czechoslovak citizens on the day this Statute comes into effect. It is therefore not necessary to apply for Czechoslovak citizenship or to wait until it is granted. ...

In this connection the Ministry of the Interior calls attention to the fact that within the territory of the CSSR

the only legal proof of identity for Czechoslovak citizens is the identity card; for foreign nationals a valid passport and residence permit is required, for stateless persons it is the proof of the "residence permit for stateless persons".

Documentary evidence of a foreign nationality (for instance documents of citizenship of the German Federal Republic)..is without legal force in the territory of our state even if it is a copy certified by a Czechoslovak Court of Justice.

The Representative of the Minister of the Interior

(signed) Colonel Kotal

Maps concerning the cession of German-Czech Territory in 1938, Auswärtiges Amt Berlin, Weissbuch (1938) Nr. 1, Verhandlungen zur Lösung der sudetendeutschen Frage. Anhang (Foreign Office Berlin, White Book (1938) No. 1, Negotiations to the Solution of the Sudeten German question, Annex)

1) Map to the German memorandum of 23. September 1938

x = Sudeten territory to be ceded.

y = territories in which plebiscites must still be held.

(Map 1)

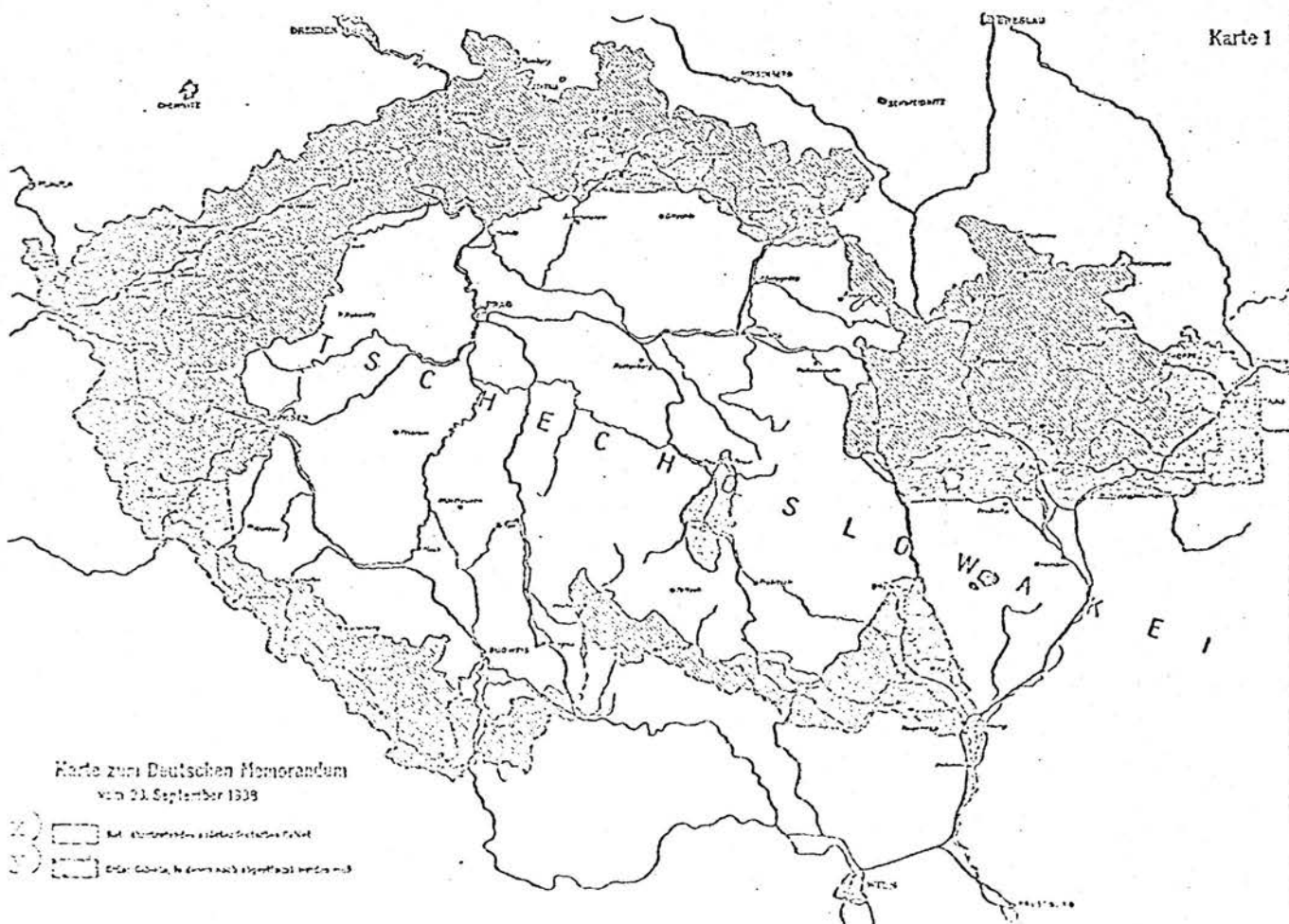
2) Map to the Munich Agreements of 29. September 1938

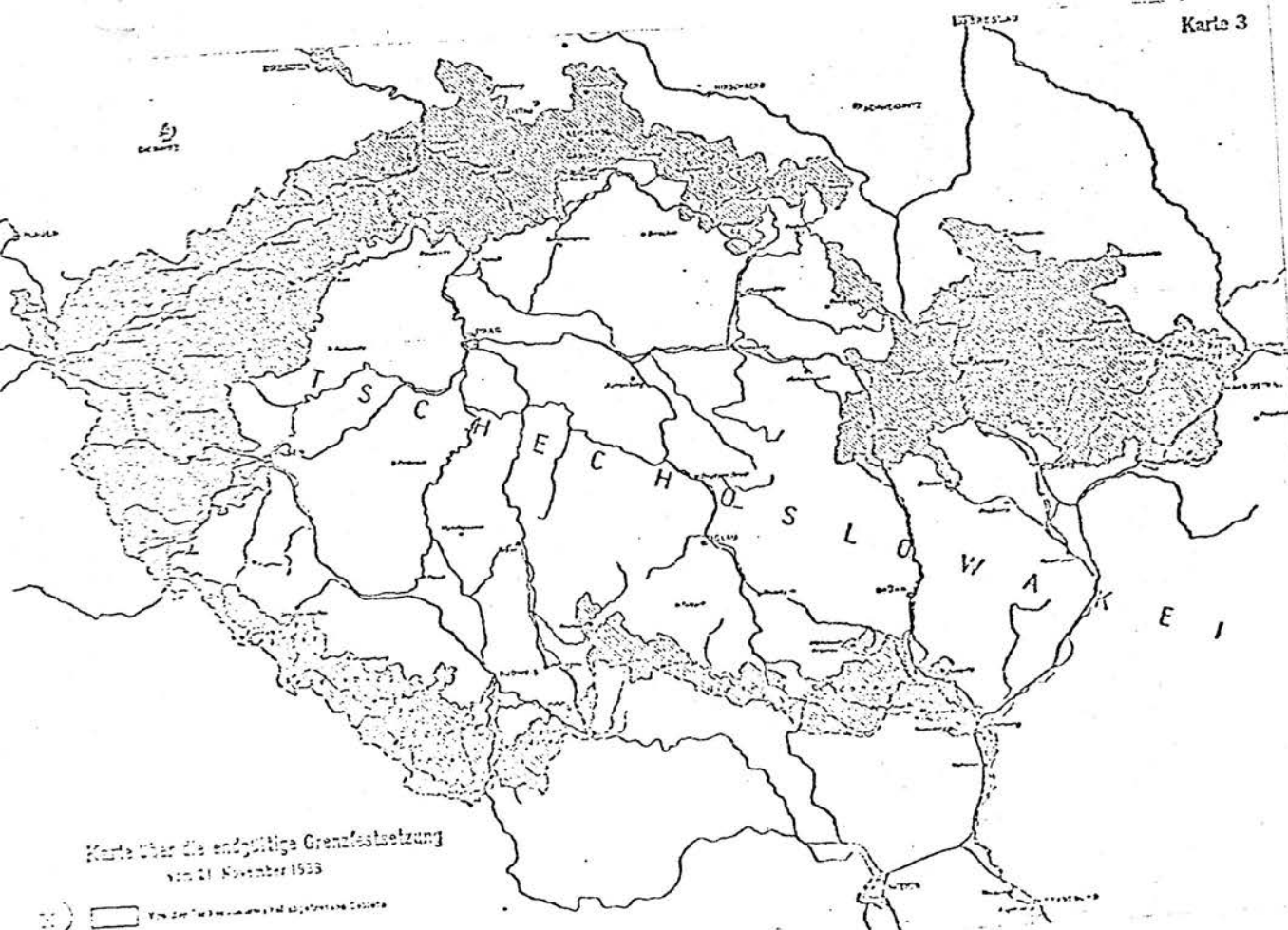
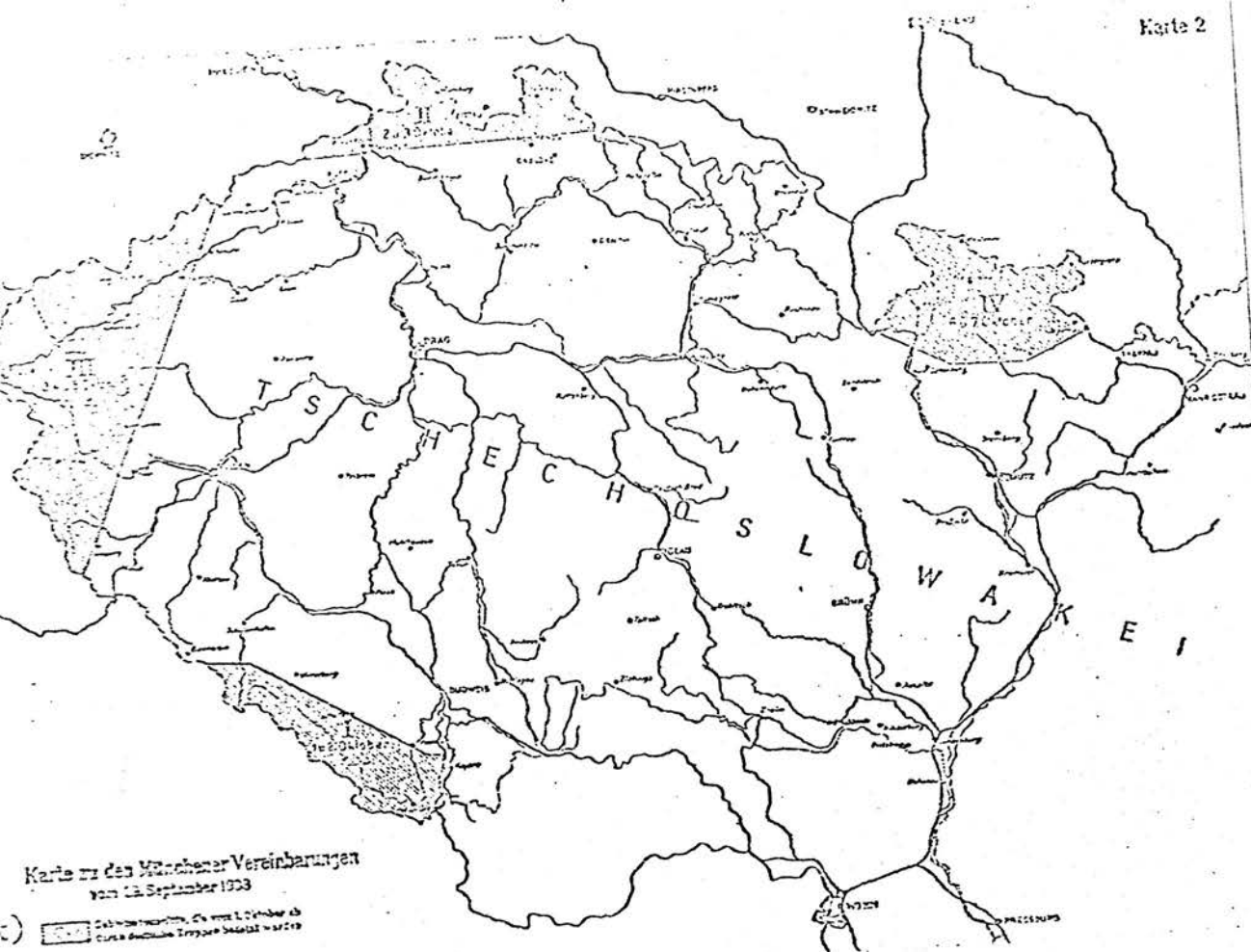
x = Sections of territory to be occupied by German troops from 1. October. (Map 2)

3) Map to the final determination of boundaries from 21. November 1938

x = territory taken from Czechoslovakia.

(Map 3).





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LIST OF ABBREVIATIONS

abgedr.	= abgedruckt (reprinted)
A.F.D.I.	= Annuaire Français de Droit International (French Yearbook of International Law)
AHC	= Allied High Commission for Germany
A.J.I.L.	= American Journal of International Law
Akten	= Akten zur Deutschen Auswärtigen Politik 1918-1945 (Documents on German Foreign Policy 1918-1945), Ser. D, Bd. II (German edition)
Akz.	= Aktenzeichen (reference number)
A.P.	= Aussenpolitik (Foreign policy), a periodical, published in the FRG
Arch.d.G.	= Archiv der Gegenwart (Archives of the present time)
Arch.d.V.	= Archiv des Völkerrechts (Archives of Public International Law)
Art.	= Article
Aufl.	= Auflage (edition)
B.Ar.	= Bundesarchiv (Federal Archives)
Bd.	= Band (volume)
Bde.	= Bände (volumes)
Beitr.z.aus.öffentl.R.u.VR.	= Beiträge zum ausländischen öffentlichen Recht und Völkerrecht (Contributions to foreign public law and international law)

BR-Drucksache	= Drucksache des Deutschen Bundesrates (Printed matter of the FC)
BRe	= Bundesrepublik (Federal Republic)
BSG (FSC)	= Bundessozialgericht (Federal Social Court)
BSGE	= Entscheidungen des Bundessozialgerichts (Decisions of the Federal Social Court), Köln und Berlin (Heymann)
BT-Drucksache	= Drucksache des Deutschen Bundestages (Printed matter of the German FD)
Bulletin	= Bulletin des Presse- und Informationsamtes der Bundesregierung (Bulletin of the Press and Information Office of the Federal Government)
BVerfGE	= Entscheidungen des Bundesverfassungsgerichts (Decisions of the Federal Constitutional Court), Tübingen (C.B.I. Mohr)
B.Y.B.I.L.	= The British Yearbook of International Law, London, New York, Toronto
CDU/CSU	= Christlich Demokratische Union/Christlich Soziale Union (Christian Democratic Union/Christian Social Union); they form a common parliamentary group within the FD, but the CSU is only admitted in Bavaria
C.d.S.	= Corriere della Sera (an Italian newspaper)
cf.	= compare further
cit.	= cited, cited after
cit.l.	= cited law

CL	= Constitutional Law (Grundgesetz)
C.L.I.	= The Case Law of the International Court, ed. by Hambro
CLN	= Covenant of the League of Nations
Cmd., Cmd.	= Command Paper
col.	= Column
CSR	= Czechoslovak Republic
CSSR	= Czechoslovak Socialist Republic
Czech.L.Coll.	= Sbirka zákonů a nařízení republiky Československé, Československé socialistické republiky (Collection of Laws and Decrees of the Czechoslovak Republic, relating to Czechoslovak Socialist Republic)
D.A.	= Deutsche Aussenpolitik (German Foreign Policy) a periodical, published in the GDR
D.D.I.C.J.	= Digest of the Decisions of the International Court of Justice
Doc.	= Documents
Document	= Document cited in the annex of this thesis
Documents (Germany)	= Documents on German Foreign Policy 1918-1945
Documents (London)	= Documents on International Affairs, London, New York, Toronto
Dok.	= Dokument (Document)
Dok. (DDR)	= Dokumente zur Aussenpolitik der Deutschen Demokratischen Republik (Documents on Foreign Policy of the GDR)

DZ	= Deutsche Zeitung (German Newspaper)
E.A.	= Europa-Archiv (Europe Archives)
ed.	= edited
E.E.	= English edition
end.c.	= à l'endroit cité (loc.cit.)
Erg.Bd.	= Ergänzungsband (Supplementary Volume)
E.t.	= English translation
f.	= folgende Seite (following page)
ff.	= folgende Seiten (following pages)
FAZ	= Frankfurter Allgemeine Zeitung (Frankfort General Newspaper)
FC	= Federal Council (Bundesrat)
FD	= Federal Diet (Bundestag)
FG	= Federal Government (Bundesregierung)
f.n.	= foot-note (germ. Fussnote)
(f.n.)	= foot-note with specific reference to a previous foot-note in this thesis
FRG	= Federal Republic of Germany
GA	= General Assembly
Gazette Int.Aff.	= Gazette of the Interior Reich Administration (Reichsministerialblatt, Innere Verwaltung) abbreviated in german: RMinBl1Y
GB1 (DDR)	= Law Gazette of the German Democratic Republic

G.D.B.	= Gesetzentwurf der Bundesregierung (Law Draft of the FG) Concerning the German-Czechoslovak Treaty of December 11, 1973
GDR	= German Democratic Republic
GFRG	= Government of the Federal Republic of Germany
GG	= German abbreviation of: Grundgesetz (Basic Constitutional Law of the FRG)
H.	= Heft (book)
H.M.S.O.	= His (Her) Majesty's Stationery Office
H.R.I.L.	= Harvard Research in International Law
I.A.	= International Affairs
Ibid.	= Ibidem (germ.: derselbe)
I.C.J.	= International Court of Justice
I.C.J. Reports	= Reports, Judgements, Advising Opinions and Orders of the International Court of Justice
I.C.J. YB.	= International Court of Justice, Yearbook
I.L.C.	= International Law Commission
I.M.T.	= International Military Tribunal, Nuremberg
intern.	= international
I.O.F.	= Journal Officiel du Commandement en chef français en Allemagne, Gouvernement Militaire de la Zone Française d'occupation (Official Journal of the French High Commander in Germany, Military Government of the French Zone of occupation)

I.O.R.	= Jahrbuch des Ostrechts (Yearbook of East Law)
J.f.I.R.	= Jahrbuch für Internationales Recht, Göttingen (Yearbook of international law)
Law Gazette	= Law Gazette of the German Reich, later the Federal Republic of Germany (Reichsgesetzblatt, resp. Bundesgesetzblatt, abbreviated in germ.: RGBl. resp. BGBl)
LFCC	= Law about the Federal Constitution Court (Bundesverfassungsgerichtsgesetz - BVGG -)
loc.cit.	= in the place cited
M.f.A.P.	= Monatsschrift für Auswärtige Politik (Monthly Journal on Foreign Policy)
M.M.	= Mannheimer Morgen (Mannheim Morning) a newspaper
ND	= Neues Deutschland, the leading newspaper of the GDR
NZZ	= Neue Zürcher Zeitung (New Zurich Newspaper)
O.R.	= Official Record
p., pp.	= page, following pages
P.C.J.	= Permanent Court of Justice
P.F.G.	= Press and Information Service of the Federal Government (Germ.: Presse- und Informationsdienst der Bundesregierung), Bonn
P.C.I.J.	= Permanent Court of International Justice

P.u.Z.	= Aus Politik und Zeitgeschichte, Beilage zur Wochenzeitung "Das Parlament" (Politics and Contemporary History, Annex to the (German) weekly "The Parliament")
RC	= Constitution of the Reich, August 11, 1919
R.C.A.D.I.	= Recueil des Cours de l'Académie de Droit International (Collection of Courses of the Hague Academy of International Law)
RG	= Reichsgericht (Reich Court of Justice)
R.G.D.I.P.	= Revue générale de Droit International Public (General Review of Public International Law)
R.I.A.A.	= Reports of International Arbitral Awards
SCOR	= Security Council, Official Records
sent.	= sentence (germ.: Satz)
Ser.	= Serie (Series)
S.ph.	= second phase
SPD	= Sozialdemokratische Partei Deutschlands (Social Democratic Party of Germany)
SZ	= Stuttgarter Zeitung (Stuttgart Newspaper)
Tz.	= Textziffern, Engl.: tn.
tn	= text-number
UN Doc.	= United Nations Documents

- UN YB. = Yearbook of the United Nations,
Office of Public Information,
United Nations, New York
- U.S.G.P.O. = United States Government
Printing Office
- usw. = und so weiter (and so on)
- v. = von, vom (from)
- WamS = Welt am Sonntag (World on Sunday)
a newspaper
- YB. I.L.C. = Yearbook of the International Law
Commission
- Z. = Zivilsachen (civil affairs)
- Z.f.aus.öffentl.R.u.VR. = Zeitschrift für ausländisches
öffentliches Recht und Völkerrecht
(Journal for foreign public law and
international law)

Addendum. The decision of the German Federal
Constitutional Court of January 25, 1977 concerning
the law of July 12, 1974 securing assent to the Treaty
of December 11, 1973 (decree and governing principle)

The Court ruled the following principle:¹

Der deutsch-tschechoslowakische Vertrag vom 11. Dezember 1973 regelt die allgemeinen politischen Beziehungen zwischen der Bundesrepublik Deutschland und der Tschechoslowakischen Sozialistischen Republik; grundrechtlich geschützte Rechtspositionen werden durch das Zustimmungsgesetz zu diesem Vertrag nicht betroffen.

Verfassungsbeschwerden gegen das Zustimmungsgesetz, die auf die Verletzung der Art. 14 (guarantee of ownership, guarantee of succession, principles of expropriation), 5 (right of free speech), 9 (freedom of association), 11 (right of free movement) und 2 GG (rights of personal freedom, in particular the right of free development of personality) gestützt werden, sind unzulässig.²

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1. The texts contained in brackets are those of the author.
 2. E.t.: The German-Czechoslovak Treaty of December 11, 1973 shall regulate the general political relations between the Federal Republic of Germany and the Czechoslovak Socialist Republic; legal positions protected by constitutional law shall not be affected by the law securing assent to this treaty.
Constitutional complaints against the law securing assent based on the violation of Articles 14, 5, 9, 11 and 2 CL are inadmissible.

The authentic wording of the substantiation of the decree reads in the tenor as follows:

Im Namen des Volkes.

In den Verfahren über die Verfassungsbeschwerden...(there follow the names of the complainants)...Bevollmächtigter: Professor Dr. Fritz Münch, ...gegen das Gesetz vom 12. Juli 1974 zu dem Vertrag vom 11. Dezember 1973 über die gegenseitigen Beziehungen zwischen der Bundesrepublik Deutschland und der Tschechoslowakischen Sozialistischen Republik (BGBl. II p. 989) hat das Bundesverfassungsgericht - Erster Senat - unter Mitwirkung des Präsidenten Dr. Benda und der Richter Dr. Haager, Rupp-v.Brünneck, Dr. Simon, Dr. Faller, Dr. Hesse, Dr. Katzenstein am 25. Januar 1977 beschlossen:

Die Verfassungsbeschwerden werden verworfen.³

The Court bases its decision on the following facts and records the formalities of the proceeding as follows:

A. Gegenstand der Verfassungsbeschwerden ist das Gesetz vom 12. Juli 1974 (BGBl. II p. 989), mit dem der Deutsche Bundestag dem Vertrag vom 11. Dezember 1973 über die gegenseitigen Beziehungen zwischen der Bundesrepublik Deutschland und der Tschechoslowakischen Sozialistischen Republik (deutsch-tschechoslowakischer Vertrag) zugestimmt hat.

3. E.t.: On Behalf of the People.

In the proceedings on constitutional complaints.... (complainants)...., authorized representative (of all the complainants):...instituted against the law of July 12, 1974 concerning the Treaty of December 11, 1973 on Mutual Relations between the Federal Republic of Germany and the Czechoslovak Socialist Republic (Law Gazette II, p. 989) the Federal Constitutional Court - First Senate - has decided by ...on January 25, 1977:

The constitutional complaints shall be rejected.

I. Der am 11. Dezember 1973 von den Vertragsparteien unterzeichnete deutsch-tschechoslowakische Vertrag ist, nachdem er die Zustimmung des Bundestags durch das Gesetz vom 12. Juli 1974 erhalten hat, mit dem Austausch der Ratifikationsurkunden am 19. Juli 1974 in Kraft getreten (BGBl. II p. 1127). Er hat folgenden Wortlaut: ... (follows the text of the Treaty, see Document No. 1, section 2 in the Annex)...

II. 1. Die Beschwerdeführer sind Sudeten-deutsche, die nach dem Ende des Zweiten Weltkriegs aus ihrer Heimat vertrieben wurden und seitdem in der Bundesrepublik leben. Sie haben nach ihren Angaben bei ihrer Vertreibung Grundbesitz in den Sudetengebieten zurückgelassen.

2. Nach Ansicht der Beschwerdeführer verletzt das Zustimmungsgesetz zum deutsch-tschechoslowakischen Vertrag ihre Grundrechte aus Art. 2, 5, 9 und 14 GG.⁴

a) In Artikel IV des Vertrags sei eine Grenzregelung enthalten, die ihre Meinungs- und Vereinigungsfreiheit beeinträchtige. Durch die Grenzregelung werde die gegenwärtige deutsch-tschechoslowakische Grenze als eine Grenze anerkannt, die nach Massgabe der in Art. 3 des Moskauer Vertrags vom 12. August 1970 enthaltenen Regelung von niemanden angetastet werden dürfe. Deshalb seien sie jetzt gehindert, durch Meinungsäußerungen oder durch ihre Tätigkeit in der Sudetendeutschen Landsmannschaft für das Selbstbestimmungsrecht der aus dem Sudetenland Vertriebenen einzutreten.

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4. Art. 2: Rights of personal freedom, in particular the right of free development of personality; Art. 5: Right of free speech; Art. 9: Freedom of association; Art. 14: Guarantee of ownership, guarantee of succession, principles of expropriation.

b) Die Grenzregelung des deutsch-tschechoslowakischen Vertrags greife darüber hinaus auch in das Eigentum an ihrem im Sudetenland belegenen Grundbesitz ein. Dieser Grundbesitz sei zwar schon in der Nachkriegszeit von den tschechoslowakischen Behörden konfisziert worden, doch hätten diese Konfiskationen nicht zu dem Untergang ihres Grundeigentums geführt. Erst die Grenzregelung des deutsch-tschechoslowakischen Vertrags habe den Verlust ihres Grundeigentums bewirkt, da mit ihr der rechtliche Status des Sudetenlandes im Sinne einer endgültigen Ausgliederung dieses Gebiets aus dem deutschen Staatsverband verändert worden sei. Die Tschechoslowakei habe damit die volle Hoheitsgewalt über das Sudetenland erworben, so daß auch die tschechoslowakischen Konfiskationsmassnahmen der Nachkriegszeit nachträglich legalisiert worden seien. Unter diesen Umständen müsse sich die Bundesregierung entgegenhalten lassen, an den Konfiskationsmassnahmen durch den Abschluss des deutsch-tschechoslowakischen Vertrags mitgewirkt zu haben.

Im übrigen sei eine Verletzung des Art. 14 GG allein auch schon darin zu sehen, dass es die Bundesregierung pflichtwidrig unterlassen habe, im Zusammenhang mit dem Abschluss des deutsch-tschechoslowakischen Vertrags zum Schutz des konfiszierten Eigentums der Sudetendeutschen tätig zu werden.

c) Die Beschwerdeführer sind schliesslich der Ansicht, dass der deutsch-tschechoslowakische Vertrag nicht nur gegen das Wiedervereinigungsgebot des Grundgesetzes, sondern auch gegen Art. 2 GG verstosse. Ihnen sei das auf das gesamte Gebiet des Deutschen Reichs bezogene Recht auf Freizügigkeit genommen, da es nach Abschluss des Vertrags in das freie Belieben des tschechoslowakischen Staates gestellt sei, ihnen den Besuch ihrer Heimat zu gestatten oder zu verweigern.

d) Im Zusammenhang mit ihrer Verfassungsbeschwerde haben die Beschwerdeführer den Antrag gestellt, die Organe der Bundesrepublik zu verpflichten, den durch das Zustimmungsgesetz, den deutsch-tschechoslowakischen Vertrag und dessen Inkrafttreten entstandenen verfassungswidrigen Zustand zu beseitigen und den dadurch entstandenen Schaden auszugleichen.

III. Der Bundesminister der Justiz, der sich für die Bundesregierung geäußert hat, hält die Verfassungsbeschwerden für unzulässig, weil die Beschwerdeführer durch das angegriffene Zustimmungsgesetz zum deutsch-tschechoslowakischen Vertrag nicht selbst, gegenwärtig und unmittelbar rechtlich betroffen seien. Der Vertrag beschränke sich darauf, die politischen Beziehungen der Bundesrepublik Deutschland zur Tschechoslowakischen Sozialistischen Republik zu regeln, und er sei deshalb nicht geeignet, irgendwelche Individualrechte der Beschwerdeführer zu beeinträchtigen.

IV. Von der Durchführung einer mündlichen Verhandlung ist abgesehen worden, da von ihr eine weitere Förderung des Verfahrens nicht zu erwarten war (§ 94 Abs. 5 BVerfGG).⁵

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5. E.t.: The subject of the constitutional complaints is the law of July 12, 1974 (Law Gazette II, p. 989) by which the German Federal Diet approved the Treaty of December 11, 1973 on Mutual Relations between the Federal Republic of Germany and the Czechoslovak Socialist Republic (German-Czechoslovak Treaty).

I. The German Czechoslovak Treaty, duly signed by the Contracting Parties on December 11, 1973 and after having been approved by the German Federal Diet by the law of July 12, 1974 has come into force upon exchange of instruments of ratification on July 19, 1974. (Law Gazette II, p. 1127).

Its wording is as follows: ...(text of the Treaty)...

II. 1. The complainants are Sudeten Germans who were expelled from their homeland at the end of the Second World War and have lived in the Federal Republic since then. According to their information they left real estate in the Sudeten-territory at the time of their expulsion.

2. In the opinion of the complainants the law of July 12, 1974 securing assent to the German-Czechoslovak Treaty violates their constitutional rights vested in Articles 2, 5, 9, and 14 CL.

a) Article IV of the treaty according to their opinion contains a frontier regulation prejudicing their freedom of speech and freedom of union. By the frontier regulation the present German-Czechoslovak frontier was recognized as a border which must not be touched by anybody according to the regulation contained in Article 3 of the Moscow Treaty of August 12, 1970. For that reason they claim to be prevented from advocating the right of self-determination for the persons expelled from the Sudeten territory by statements of opinion or by their activity in the Sudeten German Fellowship.

b) They also claim that the frontier-regulation of the German-Czechoslovak Treaty furthermore encroaches upon their property rights in their real estate situated in the Sudeten territory. This real estate was certainly already confiscated by the Czechoslovak authorities in the post-war period, but these confiscations had not caused the extinguishment of their real estate property. Only the frontier regulation of the German-Czechoslovak Treaty raised the actual loss of their real estate property as it changed the legal status of the Sudeten territory in the sense of a final disembodiment of this area from the German states. Czechoslovakia thus has gained full sovereign power over the Sudeten-territory and consequently the Czechoslovak confiscations of the post-war period had been legalized retroactively. Under these circumstances the Federal Government would have to answer the charge of having contributed to the confiscation measures by the conclusion of the German-Czechoslovak Treaty.

In addition, a violation of Article 14 CL would be given by the mere fact that the Federal Government neglected to act as a protector of the Sudeten Germans' property in connection with the conclusion of the German-Czechoslovak Treaty.

c) Finally, the complainants are of the opinion that the German-Czechoslovak Treaty not only infringes the command of reunification of the constitutional law, but also violates Article 2 CL. They claim to be deprived of the right of free movement with regard to the whole area of German territory, as it is left to the sole discretion of the Czechoslovak Government to permit or refuse the visit to their homeland after the conclusion of the treaty.

d) In connection with their constitutional complaint the complainants have filed an application that the organs of the Federal Republic of Germany be obliged to remedy the unconstitutional situation created by the law, the German-Czechoslovak Treaty and its coming into force and to compensate losses suffered thereby.

III. The Federal Minister of Justice who made a statement on behalf of the Federal Government considers the constitutional complaints as inadmissible, pointing out that the complainants are not personally, presently and directly legally affected by the criticized law of July 12, 1974 concerning the German-Czechoslovak Treaty. The treaty, was stated, confines itself to regulating the political relations of the Federal Republic of Germany and the Czechoslovak Socialist Republic and is thus ill-qualified to affect any individual rights of the complainants.

IV. No oral submissions were made, as no further progress in the proceedings could be expected (Article 94 paragraph 5 LFCC).

The legal conclusions of the Court read as follows:

B. Die Verfassungsbeschwerden sind unzulässig.

Die Beschwerdeführer sind durch das Zustimmungsgesetz zum deutsch-tschechoslowakischen Vertrag nicht in ihren Grundrechten betroffen. In dem Zustimmungsgesetz ist nichts enthalten, was unmittelbar nachteilige Wirkung für den Schutzbereich der von den Beschwerdeführern als verletzt gerügten Grundrechte erzeugen könnte (vgl. BVerfGE 40, 141 (156)).

I. Handlungs- oder Verhaltenspflichten, die geeignet wären, die Rechte der Beschwerdeführer aus Art. 5 und 9 GG zu beeinträchtigen, werden durch den deutsch-tschechoslowakischen Vertrag nicht begründet, da der Vertragstext keinerlei Formulierungen enthält, die auf derartige rechtliche Verbindlichkeiten hindeuten könnten (BVerfGE 38, 49 (51)). Aus völkerrechtlichen Verträgen wie dem deutsch-tschechoslowakischen Vertrag können unmittelbare Handlungs- oder Verhaltenspflichten einzelner Bürger nur abgeleitet werden, wenn und soweit dies der Vertragstext unzweideutig zum Ausdruck bringt. Auch aus der in Art. IV des Vertrags enthaltenen Bekräftigung der Unverletzlichkeit der gemeinsamen Grenzen lässt sich ebensowenig wie aus Art. 3 des Moskauer Vertrags eine solche unmittelbare Verpflichtung Einzelner herleiten (vgl. BVerfGE 40, 141 (164)).

II. Die Beschwerdeführer sind durch das Zustimmungsgesetz zum deutsch-tschechoslowakischen Vertrag auch nicht in ihrem durch Art. 14 GG geschützten Eigentum betroffen.

1. Die Beschwerdeführer haben ihren in den Sudetengebieten belegenen Grundbesitz durch Konfiskationsmassnahmen der tschechoslowakischen Behörden in der Nachkriegszeit verloren. Die Beeinträchtigung ihres Eigentums ist also nicht auf das Zustimmungsgesetz oder den deutsch-tschechoslowakischen Vertrag, sondern auf Massnahmen zurückzuführen, die als Akte ausländischer öffentlicher Gewalt an Art. 14 GG nicht gemessen werden können (vgl. BVerfGE 41, 126 (157 f.) m.w.N.).

2. Der Abschluss des deutsch-tschechoslowakischen Vertrags kann auch nicht als ein Mitwirken der Bundesregierung an den tschechoslowakischen Konfiskationsmassnahmen gedeutet werden. Der Vertrag

selbst enthält keine Bestimmung, die sich auch nur entfernt auf Fragen des deutschen Privateigentums bezieht. Die Bundesregierung hat auch bei Vertragsabschluss keine auf die von den tschechoslowakischen Behörden vorgenommenen Konfiskationsmassnahmen bezügliche Willenserklärung abgegeben und insbesondere keine Billigung oder Anerkennung dieser Massnahmen ausgesprochen.

3. Dem Vertrag kann auch nicht die Wirkung beigegeben werden, in sonstiger Weise eine Veränderung der eigentumsrechtlichen Lage zum Nachteil der Beschwerdeführer herbeigeführt zu haben. Dabei kann offenbleiben, ob der deutsch-tschechoslowakische Vertrag einen Wechsel des staats- und völkerrechtlichen Status der Sudetengebiete im Sinne des Vertrags der Beschwerdeführer bewirkt hat. Jedenfalls hat eine nachträgliche Legalisierung der gegen das Grundeigentum der Beschwerdeführer gerichteten tschechoslowakischen Konfiskationsmassnahmen im Zusammenhang mit dem Vertrag nicht stattgefunden. Ebensowenig enthält der Vertrag eine Bestimmung, die als Verzicht auf die Geltendmachung etwaiger daraus resultierender Ansprüche verstanden werden könnte. Soweit also den Beschwerdeführern bei Vertragsabschluss hinsichtlich ihres Vermögens noch Eigentumsrechte oder Rückgewähr- und Entschädigungsansprüche zustanden, hat sich die Rechtslage durch den Abschluss des Vertrags nicht verändert.

4. Die Bundesrepublik Deutschland ist gegenüber der Tschechoslowakischen Sozialistischen Republik weiterhin berechtigt, für die Belange der Beschwerdeführer einzutreten. Denn diese sind als Sudetendeutsche deutsche Staatsangehörige (vgl. BVerfGE 1, 322 (330 f.)). Daran hat der deutsch-tschechoslowakische Vertrag nichts geändert, da er nach seinem Artikel II Abs. 2 "die sich aus der Rechtsordnung jeder der beiden Vertragsparteien ergebende Staatsangehörigkeit lebender und verstorbener Personen unberührt" lässt.

Bei dieser Sachlage kann die Rüge der Beschwerdeführer, die Bundesregierung habe bei Vertragsabschluss die verfassungsrechtliche Pflicht zur Gewährung diplomatischen Schutzes ihnen gegenüber verletzt, nur bedeuten, dass die Beschwerdeführer

die verfassungsgerichtliche Feststellung anstreben, es hätte eine bestimmte sachliche Regelung zu ihren Gunsten bei den Vertragsverhandlungen erreicht werden müssen und im Abschluss des Vertrags ohne diese Regelung sei ein Verfassungsverstoß zu sehen, der die Unwirksamkeit des ganzen Vertrags zur Folge hätte. Soweit eine Verfassungsbeschwerde sich auf eine solche Rüge stützt, kann sie nicht als zulässig angesehen werden (BVerfGE 40, 141 (178)).

III. Das Recht der Beschwerdeführer auf Freizügigkeit wird durch den deutsch-tschechoslowakischen Vertrag nicht beeinträchtigt. Dieses Recht garantiert nach Massgabe des Art. 11 Abs. 1 GG⁶ die Freizügigkeit im Bundesgebiet, d.h. das Recht, ungehindert durch die deutsche Staatsgewalt an jedem Ort innerhalb des Bundesgebietes Aufenthalt und Wohnsitz zu nehmen, auch zu dem Zweck, in das Bundesgebiet einzureisen (BVerfGE 2, 266 (273)); dazu gehören die Sudetengebiete nicht.

Auch eine Verletzung des Art. 2 Abs. 1 GG kommt nicht in Betracht; soweit die Beschwerdeführer gehindert sind, die Sudetengebiete aufzusuchen, ist dies nicht auf den Vertrag zurückzuführen.

Auf das Wiedervereinigungsgebot des Grundgesetzes kann eine Verfassungsbeschwerde schon deswegen nicht gestützt werden, weil dieses Gebot nicht Grundrechte gewährleistet.

IV. Schadensersatzansprüche können mittels der Verfassungsbeschwerde vor dem Bundesverfassungsgericht nicht geltend gemacht werden (BVerfGE 1, 3).⁷

6. Art. 11: Right of free movement.

7. E.t.: B. The constitutional complaints are inadmissible.

The constitutional rights of the complainants are not affected by the law securing assent to the German-Czechoslovak Treaty. Said law does not include any provision that could be directly detrimental to the area of protection of the complainants' constitutional rights, which they claim have been infringed (refer to BVerfGE 40, 141 (156)).

I. The German-Czechoslovak Treaty does not substantiate any patterns of action or behaviour which would qualify to affect the rights of the complainants vested in Articles 5 and 9 CL, as the wording of the treaty does not include any formulations pointing to any such legal obligations (BVerfGE 38, 49 (51)). From treaties of public international law such as the German-Czechoslovak Treaty, direct patterns of action or behaviour of individual citizens may be derived only, if and inasmuch the wording of the treaty expresses this in an unequivocal manner. Such a direct obligation of individuals cannot be derived either from the assessment of inviolability of common borders contained in Article IV of the Treaty nor from Article 3 of the Treaty of Moscow (refer to BVerfGE 40, 141 (164)).

II. By the law securing assent to the German-Czechoslovak Treaty the complainants' property rights, protected by Article 14 CL are not affected either.

1. The complainants have lost their estate situated in the Sudeten territory in the post-war era by confiscation measures of the Czechoslovak authorities. Thus the interference with their property is not caused by the law securing assent or the German-Czechoslovak Treaty, but by measures which cannot be related to Article 14 CL as acts of foreign public authority (refer to BVerfGE 41, 126, (pp. 157), with further evidence).

2. The conclusion of the German-Czechoslovak Treaty cannot be interpreted either as a contribution of the Federal Government to the Czechoslovak confiscation measures. The treaty itself does not include any provision whatsoever which could be related to matters of German private property. The Federal Government has not made any policy statement concerning the confiscation measures taken by the Czechoslovak authorities, at the conclusion of the treaty and in particular expressed no approval or recognition of these measures.

3. It also cannot be attributed to the treaty that it has influenced or caused a change in the legal position of property rights to the prejudice of the complainants. The question of whether or not the German-Czechoslovak Treaty has caused a change

in the national and international status of the Sudeten territories in the sense of the grounds of the complainants can be left undecided. In any case no retroactive legalisation of the Czechoslovak confiscation measures directed against real estate property of the complainants in connection with the treaty has occurred. The treaty does not include either any provision that could be deemed as a waiver to the enforcement of any claims resulting from it. Inasmuch as the complainants had legal title to their property or claims for restitution or losses, the legal position consequently has not been changed by the conclusion of the treaty.

4. The Federal Republic of Germany shall also be entitled in the future to represent the claims of the complainants against the Czechoslovak Socialist Republic. Because as Sudeten Germans they are German citizens (refer to BVerfGE 1, 322, pp. 330)). The German-Czechoslovak Treaty has not changed anything in this respect, as according to its Article II, paragraph 2 "shall not affect the nationality of living or deceased persons ensuing from the legal system of either of the two Contracting Parties."

Under these circumstances, the reprimand of complainants, namely that at the time of conclusion of the treaty the Federal Government had violated the obligation vested in constitutional law to grant them diplomatic protection, can only mean that the complainants aim at the assessment of the Constitutional Court, that a certain objective settlement in their favour should have been achieved during the negotiations and that the conclusion of a treaty without such settlement must be considered as a constitutional violation, causing the nullity of the entire treaty. Inasmuch as a constitutional complaint is based on such a reprimand, it cannot be considered admissible (BVerfGE 40, 141 (178)).

III. The right of the complainants for free movement shall not be prejudiced by the German-Czechoslovak Treaty. According to Article 11, paragraph 1 CL this right guarantees free movement within the Federal State, i.e. the right to take up residence or domicile at any place in the Federal States unimpeded by the German public authority, also for the reason to enter into the Federal States (BVerfGE 2, 266 (273)); the Sudeten territory does not form part of it.

A violation of Article 2, paragraph 1 CL shall not be considered; inasmuch as the complainants are prevented from travelling to the Sudeten territory, this fact is not caused by the treaty.

A constitutional complaint cannot be based on the command of reunification of the constitutional law, for the simple reason that this command does not warrant constitutional rights.

IV. No damage claims are enforceable by means of a constitutional complaint before the constitutional court (BVerfGE 1, 3).